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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIE N. REDDIX,
Petitioner

VS.

STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHERE THE SUPREME COURT OF MISSISSIPPI HAS NOT ADOPTED A BROAD AND VAGUE CONSTRUCTION OF SECTION 99-19-101(5)(h), MISS. CODE ANN. (SUPP.1979), THERE IS NO VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS ON THE RULING OF GODFREY V. GEORGIA, ___U.S. ___, 64 L.ED.2d 398, 100 S.CT. ___(1980), AND CERTIORARI SHOULD BE DENIED.

II.

WHERE THE DEATH SENTENCE IS IMPOSED BY A SENTENCING JURY THAT HAS BEEN INSTRUCTED IN SUCH A MANNER AS TO ALLOW CONSIDERATION OF ALL RELEVANT CIRCUMSTANCES SURROUNDING THE CRIME OF WHICH A DEFENDANT HAS BEEN CONVICTED, THE EIGHTH AND FOURTEENTH AMENDMENTS ARE NOT OFFENDED AND CERTIORARI SHOULD BE DENIED.

PARTIES

In the Supreme Court of Mississippi the parties were: Willie N. Reddix, appellant, and the State of Mississippi, appellee.

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the petition for writ of certiorari to the Supreme Court of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Willie N. Reddix v. State, 381 So.2d 999 (Miss.1980). Rehearing was denied on April 16, 1980. A copy of the opinion is before this Court as an Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. Section 1257(3).

-/-

STATEMENT OF THE CASE

Petitioner, Willie N. Reddix, was indicted for the crime of capital murder by the Grand Jury for the Circuit Court for the Second Judicial District of Harrison County, Mississippi during the February 1975 Term. The indictment grew out of the December 2, 1974 slaying of Arthur Weinberger, a seventy-seven year old store owner, by petitioner and Larry Jones.

Petitioner was first tried, convicted and sentenced to death in March, 1975. The conviction and sentence were reversed and remanded for new trial in accord with Jackson v. State, 337 So.2d 1242 (Miss.1976). [A copy of the Mississippi Supreme Court's unpublished opinion in that case is before the Court as Appendix B to the Petition.] The companion case of Larry Jones, petitioner's accomplice, was treated similarly. Jones v. State, 342 So.2d 735 (Miss. 1977).

Petitioner was again put on trial during the December 1977 Term of the Harrison County Court. His second trial was conducted under the procedures mandated by the Mississippi Supreme Court in Jackson v. State, 337 So.2d 1242 (Miss.1976) and Section 99-19-101 to 107, Mississippi Code Ann. (Supp. 1979).

At the conclusion of the guilt phase of the bifurcated trial, the jury, after proper instruction and hearing arguments, retired to consider their verdict. After deliberation the jury returned a verdict stating: "We The Jury Find The Defendant Guilty of Capital Murder." The trial then proceeded into the punishment or sentencing phase. Again, after receiving proper instruction and hearing arguments, the jury retired to consider sentence. The jury returned the following sentence:

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"We, the Jury unanimously find from the evidence and beyond reasonable doubt that the capital murder in this case was committed while the Defendant was engaged in the Commission of the crime of robbery; that the capital offense was especially heinous, atrocious and cruel; and that the Defendant has been previously convicted of a felony involving the use or threat of violence to the person.

"We further find unanimously from the evidence and beyond a reasonable doubt that after weighing mitigating circumstances and the aggravating circumstances, one against the other, that the mitigating circumstances do not outweigh the aggravating circumstances, and that the Defendant should suffer the penalty of death."

S/ Herbert Broussard
Forman of the Jury

On automatic review to the Mississippi Supreme Court the conviction and sentence of death was affirmed by a unanimous court on February 13, 1980. Reddix v. State, 381 So.2d 999 (Miss. 1980). The conviction and sentence of death was also affirmed in the companion case of accomplice Larry Jones. Jones v. State, 381 So.2d 983 (Miss. 1980).

A timely petition for rehearing was filed by petitioner. The Court below denied rehearing on April 16, 1980. On April 29, 1980 the state court was moved to stay the execution of sentence pending the outcome of the present petition to this Court. On May 7, 1980 the Mississippi Supreme Court stayed execution pending further order.

The facts of this case, as reflected by the record, show that on the morning of December 2, 1974, petitioner and Larry Jones asked J. D. Reddix, petitioner's brother, to drive them to downtown Biloxi, Mississippi. J. D. agreed.

Upon arriving in the downtown area, J. D. parked his car in a parking lot behind the main business area. Larry Jones and petitioner told J. D. to wait for them. In accord with their "plan", the two men went to Art's Levi Store. Arthur Weinberger, the seventy-seven year old proprietor, was alone in the store. Petitioner entered the store and engaged Weinberger in a conversation about some clothing. Petitioner kept Weinberger's back to the door while

his accomplice, Jones, entered the store and crept up behind the owner. Jones then struck Weinberger several times on the head with a wrench, knocking him to the floor. Petitioner then ran to the door of the shop to "keep a watch out". Jones dragged Weinberger into the office.

Jones then gathered items from the store while petitioner kept watch. When Jones could not get the cash register open, petitioner left his lookout position to open it for him. After putting the gathered items in a footlocker, the two fled the scene with the money and merchandise taken from the store.

Weinberger was discovered a few moments later by a customer. The police were summoned and the aged store owner was taken to the hospital. Approximately five hours later, Weinberger died of cardiac arrest caused by severe trauma to the brain.

REASONS FOR DENYING THE WRIT

I.

WHERE THE SUPREME COURT OF MISSISSIPPI HAS NOT ADOPTED A BROAD AND VAGUE CONSTRUCTION OF SECTION 99-19-101(5)(h), MISS. CODE ANN. (SUPP.1979), THERE IS NO VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OR THE RULING OF THIS COURT IN GODFREY V. GEORGIA, ___ U.S. ___, 64 L.ED.2d 398, 100 S.CT. ____ (1980), AND CERTIORARI SHOULD BE DENIED.

Petitioner attacks the eighth statutory aggravating circumstance which authorizes the imposition of the death penalty if the jury finds, beyond a reasonable doubt, the "capital offense was especially heinous, atrocious or cruel." Miss. Code Ann., § 99-19-101(5)(h) (Supp.1979).[1/] He contends the court below has failed to judically limit the meaning of these words, making the death sentence returned the result of the uncontrolled discretion of a basically uninstructed jury. We respectfully disagree and submit that the holding in Spinkellink v. Wainwright, 578 F.2d 582 (5 Cir. 1978), is correct and forecloses both the Eight and Fourteenth Amendment inquiries.

Respondent would state, peliminarily, that this exact question has been presented to this Court no less than three times. Certiorari has been denied on the issue in Voyles v. Mississippi, 441 U.S. 956 (1979) and Gray v. Mississippi, No. 79-6250, ___ U.S. ___, 64 L.Ed.2d 847 (1980). Although the denial of certiorari in Voyles came before Godfrey, the denial of certiorari in Gray came after the Godfrey ruling [May 19, 1980] on June 2, 1980. It is noted that Gray moved the Court to reconsider its denial of certiorari

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1/ The jury in petitioner's case found two other aggravating circumstances existed beyond a reasonable doubt. They were (1) the capital offense was committed while the defendant was engaged in the commission of the crime of robbery; (2) the defendant was previously convicted of a felony involving the use or threat of violence to the person.

in light of Godfrey to no avail. The question is presently before the Court in Alvin Culberson v. State of Mississippi, No. 79-6715, docketed with the Clerk of this Court on June 4, 1980.

The same question has also been twice presented in a habeas corpus context to United States District Court for the Northern District of Mississippi. Chief Judge William C. Keady has twice decided the question adversley to the position petitioner takes here. Washington v. Watkins, No. GC 79-93-K-P (N.D. Miss. Dec. 18, 1979) [Judge Keady's unpublished opinion is attached hereto as Appendix A]; Voyles v. Watkins, 489 F. Supp. 901 (N.D. Miss. 1980) [relief granted on other grounds]. These two decisions admittedly were made before this Court's ruling in Godfrey. Further, the question is now pending before the United States Court of Appeals for the Fifth Circuit in Washington v. Watkins, No. 80-3072. The briefs have been submitted in this appeal and the case is presently awaiting argument before the Fifth Circuit.

Respondents would respectfully submit that any challenge to the facial validity of § 99-19-101(5)(h) is precluded by this Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976). There the Court held the almost identical language of Florida's statute [§ 921.141(5)(h)] to be valid on its face. 428 U.S. at 255. Petitioner's challenge must rest on the basis of application of the section to his case.

Respondent is aware that the provisions contained in § 99-19-101(5)(h) must be considered as they have been construed by the Supreme Court of Mississippi. Godfrey v. Georgia, 64 L.Ed.2d at 403; Proffitt v. Florida, 428 U.S. at 255; Gregg v. Georgia, 428 U.S. at 201 - 202.

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Respondent agrees that the court below, unlike the Supreme Court of Florida, has expressly declined to construe directly the statutory language attacked by petitioner. In Washington v. State, 361 So.2d 61 (Miss.1978), the identical question was before the Mississippi Court. Responding thereto, it stated:

> In our opinion the words 'especially heinous, atrocious or cruel' are not confusing nor likely to be misunderstood by the average citizen. The average citizen has a reasonable knowledge of the generally accepted meaning of these words. . . . which of necessity must be general when placed in statutes . . . .. (emphasis added) 361 So.2d at 65-66.

While the State Court declined to further define directly, by judicial construction, the words "heinous, atrocious or cruel," it gave to them their "generally accepted meaning" and left to the jury the task of applying these words to the various factual situations involved in death penalty cases.

While there has been no direct limitation, respondent is not in agreement with petitioner's suggestion that the Supreme Court of Mississippi has "routinely affirmed the death sentences without any limiting construction." Petitioner's pleading at 18. It has on several occasions done so, albeit indirectly.

Factor (5)(h) has been relied upon as a partial basis for infliction of the death penalty in seven (7) cases tried under stautory bifurcation.[2/] In addition, it was cited as a viable aggravating factor for the purpose of appellate review in one case

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2/ They are: Washington v. State, 361 So.2d 61 (Miss.1978), cert.denied 441 U.S. 916 (1979); Voyles v. State, 362 So.2d 1236 (Miss.1978), cert.denied 441 U.S. 956 (1979); Gray v. State, 375 So.2d 994 (Miss.1979), cert.denied ___ U.S. ___, 64 L.Ed.2d 847 (June 2, 1980); Culberson v. State, 379 So.2d 499 (Miss.1980); Jones v. State, 381 So.2d 983 (Miss.1980); Reddix v. State, 381 So.2d 999 (Miss.1980), Bullock v. State, No. 51,937, decided August 6, 1980, not yet published [Godfrey question being considered on petition for rehearing].

tried under Jackson or judicial bifurcation.[3/] While (5)(h) was not submitted to the sentencing jury in that particular case, the reviewing Court noted ". . . that the execution type murder itself was especially heinous, atrocious and cruel, involving mental torture of the victim." 360 So.2d at 1213.

In Washington v. State, 360 So.2d 61 (Miss.1978), the court below fully concurred with the sentencing jury which found the existence of (5)(h). It observed that "[i]t was an especially wanton, wilful, useless and cruel killing." 361 So.2d at 67 [emphasis added].

Additional guidance and judicial insight into the question has been provided by our Court in subsequent cases where the sentence of death was based, in part, on aggravating circumstances (5)(h).[4/] In Gray v. State, 375 So.2d 994, 1004 (Miss.1979), the state court characterized Gray's offense, in this language: "The crime was brutish and cruel, committed upon a helpless and trusting child, for a sordid motive. It was the second human life appellant had taken." [emphasis added] In addition, the court concluded ". . . that the killing of the three year old child by Gray was 'especially heinous, atrocious and cruel.' It was a brutal killing for a sordid purpose of a helpless child. 375 So.2d at 1005 [emphasis added].

3/ SEE: Bell v. State, 360 So.2d 1206 (Miss.1978), cert. denied 440 U.S. 950 (1979).

4/ Mississippi has no case finally decided where the aggravating circumstance assailed here nakedly supported a jury finding that the death penalty should be imposed. In all seven (7) of the cases reviewed to date, the jury has found the existence of one or more statutory aggravating factors in addition to its finding and reliance upon 99-19-101(5)(h). In Godfrey v. Georgia, of course, the Georgia jury relied exclusively upon the § (b)(7) aggravating factor as a basis for imposing its sentence of death.

In Culberson v. State, 379 So.2d 499, 510 (Miss.1980), the court below held the penalty of death ". . . is a proper sentence for the senseless and unprovoked murder commited by Culberson, who, after first knocking the victim down with a table leg, then shot the victim while he was lying on the ground begging, 'Help me, help me'." [emphasis added]

In Jones v. State, 381 So.2d 983 (Miss.1980), the case involving petitioner's co-defendant, the Mississippi Court found aggravating circumstance (5)(h) ". . . was proved by pictures illustrating the atrociousness of the killing, together with testimony showing the victim to have been old and weak in comparison with appellant." 381 So.2d at 995. The Court further said:

> Compared to the other capital cases in which we have affirmed the death sentence, this killing was equally as wanton, cruel and senseless as the others. The defendant was actively engaged in a robbery during the course of which the victim, a merchant over seventy years of age, was brutally murdered by blows to the head which crushed his skull.
>
> [emphasis added] 381 So.2d at 996.

In petitioner's case our Court opined that the participation of Reddix in "[h]olding the victim's attention from Jones was as much a part of Jones' bludgeoning the victim as if appellant had physically restrained him while his head was being crushed." 381 So.2d at 1012. When considering petitioner's case we must consider the court's characterization of the crime contained in Jones.

In Coleman v. State, 378 So.2d 640 (Miss.1979), the Court reaffirmed the position taken in Washington that the statutory language did not suffer from vagueness or overbreadth. The jury in Coleman did not find the existence of this statutory aggravating factor [(5)(h)], even though it was submitted to the sentencing authority for consideration. This would seemingly

give credence to our present position that there is no reason to believe that § 99-19-101(5)(h) will not be understood by Mississippi juries and applied in a consistent and evenhanded manner.

There is language in the Coleman opinion touching upon the scope of the aggravating factor here assailed. We quote:

> In Irving, Washington and Bell, the killings were totally senseless and committed upon hapless victims unarmed and unable to protect themselves. The circumstances in this case are strikingly different. Here, Harry Burkett, the victim, upon seeing the foot of Sims protruding from under the pickup truck, began firing his pistol. Only after being fired upon did the 16-year-old Coleman shoot. Again, Coleman had the opportunity to shoot Mrs. Burkett, who was an eyewitness, but did not. He fled the scene instead.
>
> 378 So.2d at p. 650 [emphasis added]

Therefore, the Supreme Court of Mississippi has indirectly provided guidance as to the meaning of the statutory language "especially heinous, atrocious or cruel." The court below has characterized such killings as "wanton, wilfull, useless and cruel",[5/] "brutish" and "brutal",[6/] "senseless",[7/] and "unprovoked."[8/] The circumstances in each of the seven (7) cases decided to date involving jury reliance upon §99-19-101(5)(h) can be accurately characterized as "especially heinous, atrocious, or cruel." Such a characterization is wholly consistent with the "generally accepted meaning" of the words and the judicial construction our Court has indirectly given (5)(h).

5/ SEE: Washington v. State, 360 So.2d at 67.

6/ SEE: Gray v. State, 375 So.2d at 1004.

7/ SEE: Culberson v. State, 379 So.2d at 510; Jones v. State, 381 So.2d at 996; Coleman v. State, 378 So.2d at 650 and cases cited therein.

8/ SEE: Culberson v. State, 379 So.2d at 510.

The court in Mississippi has further demonstrated its commitment to keeping (5)(h) within constitutional bounds by looking to the posture of the victim, the motive of the convicted killer in taking life and the means used to inflict the mortal wound. The court below has not given pro forma review to the cases where (5)(h) was applied by the jury.

In the case at bar the question concerning the application of (5)(h) was not presented until after the decision was rendered and a petition for rehearing was filed by petitioner. There would be no reason for the Court to address the issue in the opinion when it is not raised. However, we do have benefit of the Court's thinking on the (5)(h) issue. The companion case of petitioner's co-defendant, Jones v. State, 381 So.2d 983 (Miss.1980) [a copy of the opinion is attached as Appendix B], enlightens us as to how the court below viewed the crime. In Jones, the court characterized the killing as being "equally as wanton, cruel and senseless" as the other death penalty cases affirmed by it. The court further stated the seventy-seven year old victim was "brutally murdered by blows to the head which crushed the skull." 381 So.2d at 996. Respondent would submit that this language contained in Jones is equally applicable to petitioner's case, as it is the same crime with the same facts.

Respondent is not unmindful of Godfrey v. Georgia, ___ U.S. ___, 64 L.Ed.2d 398, 100 S.Ct. ____ (1980), but hardly thinks this recent decision adds new dimensions to petitioner's Due Process and Eighth Amendment claims. Aside from the fact the statutory provision criticized there is qualitatively different from the one under scrutiny here, Godfrey's sentence of death rested exclusively on Georgia's § (b)(7) factor. In note 15, the Court said: "[W]e intimate no view as to whether or not the petitioner might constitutionally have received the same sentence on some other basis." 64 L.Ed.2d 398.

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Petitioner's case is completely different. Here the (5)(h) factor was one of three aggravating factors serving as a basis for the penalty imposed. In addition, the Godfrey Court noted that Godfrey's victims were killed instantly, while petitioner's victim lingered for approximately five hours after having his skull crushed. In Godfrey, the victims were members of his family who where causing him extreme emotional trauma, while Mr. Weinburger had done nothing to either Reddix or Jones to cause them distress. While the Court mentioned these facts for the purpose of negating the contention that Godfrey's killings involved "depravity of mind," such nevertheless, constitutes a distinction that must be reckoned with in assessing the scope and reach of (5)(h).

It was apparent in Godfrey that the Georgia Supreme Court, in affirming a sentence of death ". . . based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman'" [64 L.Ed.2d at 406.], adopted ". . . such a broad and vague construction of the § (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments . . ." We submit, on the other hand, the Supreme Court of Mississippi did not do so in petitioner's case.

A review of our death penalty decisions indicates that Mississippi's capital sentencing scheme, including the application of subsection (5)(h), provides a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972). Coleman v. State, 378 So.2d 640 (Miss.1979), clearly illustrates the fair and evenhanded application of the (5)(h) factor by a Mississippi jury. Coleman, a black male, shot and killed a white homeowner,[9/] after the latter drove up and surprised the

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9/ Harry Burkett, the homeowner had befriended Coleman in the past allowing him to do odd jobs on his place when the young man was in need of money.

defendant who was burglarizing the premises. The victim was not "helpless"; he was armed with a pistol and proceeded to investigate. The killing of the victim was not without some "provocation", because the victim fired first. The jury declined to find this killing "especially heinous, atrocious, or cruel." Moreover, the Supreme Court of Mississippi reversed the sentence of death, finding it ". . . excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." 378 So.2d at 650.

Respondent respectfully submits that provision (5)(h), as contrued to date by the Mississippi appellate judiciary, is not so imperfect as to raise a serious risk that our capital-sentencing system will result in the arbitrary and capricious imposition of the death penalty. We contend that such has not occurred, and there is no compelling reason to think that it will. Further, judicial explication by our State Court and the Circuit Court of Appeals will in due course follow, but for the present time we feel that more intimate appellate scrutiny of the question presented must await a new horizon.

II.

WHERE THE DEATH SENTENCE IS IMPOSED BY A SENTENCING JURY THAT HAS BEEN INSTRUCTED IN SUCH A MANNER AS TO ALLOW CONSIDERATION OF ALL RELEVANT CIRCUMSTANCES SURROUNDING THE CRIME OF WHICH HE HAS BEEN CONVICTED, THE EIGHTH AND FOURTEENTH AMENDMENTS ARE NOT OFFENDED AND CERTIORARI SHOULD BE DENIED.

Petitioner's contention that his case squarely presented the question reserved by the Court in footnote 16 of Lockett v. Ohio, 435 U.S. 586, 609 (1978), is based on two grounds, neither of which are supported by fact. First respondent would point out that the question petitioner states was reserved, is different from what the Court actually stated. Petitioner's version adds aspects not contained in the Court's footnote. The question reserved by the Court is Lockett was:

> [Whether] the death penalty is constitutionally disproportionate for one who has not been proven to have taken life, to have attempted to take life, or to have intended to take life. . ..
>
> 435 U.S. at 609 n. 16.

Petitioner first claims there was no finding by the jury that he intended to take life making the sentence of death disproportionate to the crime and thus impermissible. Such a claim only serves to demonstrate the lack of knowledge petitioner has of Mississippi law. His second claim is that the jury was not properly instructed as to his lack of intent to kill as a mitigating circumstance.

Contrary to petitioner's assertions, the jury in his case made a finding of intent when it returned the verdict: Guilty of Capital Murder. Under Miss. Code Ann. § 97-3-19(2)(e) (Supp.1979), a jury can and has returned a guilty verdict without a finding of intent to kill, but not in petitioner's case. The indictment on which petitioner was tried states in part:

> That Willie N. Reddix, . . .did unlawfully, wilfully & feloniously, with malice aforethought, kill and murder one Arthur Weinberger, a human being, while engaged in the commission of the crime of robbery upon him. . .. [emphasis added] 10/

Petitioner was tried under an indictment succinctly charging malice even though such was not an essential ingredient of the offense charged. The State had the burden of proving its existence, and the jury was instructed in a manner requiring, as a prerequisite for a capital conviction, a finding that the killing was maliciously perpetrated. It was thus not possible for the jury to find petitioner guilty of capital murder without also finding that he killed and murdered his victim maliciously.

We observe that the indictment at bar contains the phrase ". . . unlawfully, wilfully, & feloniously, with malice aforethought, kill and murder . . ." [emphasis added]. The word "unlawfully" means "in violation of law," Gilbert v. State, 198 Miss. 175, 21 So. 2d 914, 916 (1945), and connotes, in a homicide case, that the act was done without justification or excuse. "Wilfully" means "intentionally," i.e. not by accident or lawful excuse, and implies that an act is done "knowingly." Ousley v. State, 154 Miss. 451, 122 So. 731 (1929). "Feloniously" is a technical word of the law, and means "done with the intent to commit a crime; of the grade or quality of a felony." Martin v. State, 163 Miss. 454, 142 So. 15 (1932). These adverbs are descriptive of the capital offense charged, namely, capital murder with malice or deliberate design. The court below has long held that malice aforethought and deliberate design mean the same thing. Hawthorne v. State, 58 Miss. 778 (1881). [Copy attached hereto as Appendix D]

10/ A copy of the indictment is attached hereto as Appendix C.

As stated above, the instructions given to the jury on the guilt phase of the trial were not at variance with the indictment. Instruction S-1 required the jury to find the murder was committed with "any design to effect death" and "with the formed purpose to effect [Weinberger's] death." Instruction S-2 required the jury to find that petitioner "in concert with another did unlawfully, wilfully, feloniously and of their malice aforethought kill and murder Arthur Weinberger. . . ."[11/]

From the foregoing, it is clear that petitioner is factually and legally incorrect when he states there was no finding of intent to kill. The fact there was a finding of intent would seem to preclude the second thrust of his argument. However, since petitioner is again factually incorrect respondents will enlighten.

During the sentencing phase of the trial the jury was instructed in part:

> In this case the "Mitigating Circumstances" may be the following:
> 1. The age of the Defendant at the time of the crime.
> 2. Any mitigating circumstances or combination of mitigating circumstances surrounding his life and character.
> 3. Any mitigating circumstances or combination of mitigating circumstances surrounding the commission of the offense with which he is charged.[12/]
>
> (emphasis added)

On the basis of this instruction the jury was allowed to consider "any" circumstances or combination of circumstances surrounding the crime in its deliberation on sentence. Petitioner claims the trial court was required to give the more limited instruction contained in Section 99-19-101(6)(d), Miss. Code Ann. (Supp.1979). Section (6)(d) reads:

11/ Copies of Insturction S-1 and S-2 are attached hereto as Appendices E and F.

12/ A copy of Instruction S-3 is attached hereto as Appendix G.

> The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

Certainly this factor is included in the instruction given. Petitioner was free to request that an instruction along these lines be given. He admits he did not. He does not claim that he was prevented in any way from putting on evidence of his minor participation in the crime or arguing this claim to the jury.

Specifically, had petitioner chosen to argue that he did not intend to aid in the killing of Arthur Weinberger at the sentencing phase he was free to do so under the instructions given. This is true even though the jury had already found that he intneded, in furtherance of their "plan", to assist Larry Jones in killing Arthur Weinberger.

The court below held in Jones:

> He and Jones, his accomplice, had a plan for and in what they were about. It is argued that the record does not show what the plan was. The poet said that the best study of mankind is man, and Holy Writ says, "By their fruits ye shall know them." There is no showing in this record that anything unanticipated occurred, to throw them off balance or to change their course. Holding the victim's attention from Jones was as much a part of Jones' bludgeoning the victim as if appellant had physically restrained him while his head was being crushed.
>
> 381 So.2d at 1011-1012.

After setting forth the cases used in its comparative review, the court said:

> In these cases there is no death sentence of one not physically acting or assisting in the killing, as is the situation here. Neither is it true that there was one planned and executed in more deliberate fashion than the one now before us.
>
> . . .
>
> Considering the crime and the appellant, we do not conclude that the death sentence is excessive and disproportionate to that imposed in similar cases.
>
> 381 So.2d at 1012-1013.

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The instructions granted in no way offend the ruling of Lockett v. Ohio, 438 U.S. 586 (1978). The crime here was deliberately done with Larry Jones and petitioner acting in concert. The death penalty is in no way excessive or disproportionate when the crime, the petitioner and the surrounding circumstances of each are considered.

There being no violation of the Eighth or Fourteenth Amendments certiorari should be denied.

CONCLUSION

For the reasons stated above the Petition For A Writ Of Certiorari To The Supreme Court of Mississippi should not be granted.

Respectfully submitted,

BILL ALLAIN, ATTORNEY GENERAL

BY: KAREN GILFOY
ASSISTANT ATTORNEY GENERAL

and

BY: MARVIN L. WHITE, JR.
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JOHN LEWIS WASHINGTON, Petitioner

V.

NO. GC 79-93-K-P

JOHN C. WATKINS, ET AL, Respondents

MEMORANDUM OPINION

John Lewis Washington, petitioner in this federal habeas corpus action, attacks the constitutionality of his May 1977 conviction in the Circuit Court of Lowndes County, Mississippi, of the crime of capital murder and the sentence of death imposed upon him pursuant thereto. The petition was initially referred to Charles M. Powers, United States Magistrate, for report and recommendation on the several claims for habeas relief and the necessity, if any, for an evidentiary hearing. On September 24, 1979, the Magistrate reported that petitioner's several claims were without merit but nevertheless recommended that because of the death sentence the court grant an evidentiary hearing on the claim of ineffective assistance of counsel.

An evidentiary hearing limited to that single issue was held at Aberdeen, Mississippi, on November 9, 1979, and petitioner personally appeared on a writ of habeas corpus ad testificandum. Upon the call of the case, counsel for petitioner and respondent announced their readiness for trial. Petitioner's counsel called as witnesses Darrell Reeves, attorney of Columbus, Mississippi, and Tony Axam, an attorney licensed to practice in the States of Georgia and Michigan and a specialist in capital defense cases. They also introduced certain documentary evidence. The respondent rested after introducing the record of the criminal trial in the state courts of Mississippi. Petitioner personally informed the

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Appendix A

court that he did not desire to testify. From the evidence adduced, the court finds the following facts:

I. FINDINGS OF FACT ON EFFECTIVENESS OF COUNSEL

Darrell Reeves, 37, trial counsel for petitioner in the state criminal proceeding, is a practicing attorney at Columbus, where he has engaged in the general practice of law since 1968. Reeves obtained his Bachelor of Arts degree from the University of Virginia and his LLB degree from the University of Mississippi law school. He has been admitted to practice in all state and federal courts of Mississippi, the Fifth Circuit Court of Appeals, and in the Alabama Circuit Court. Reeves has had experience trying both civil and criminal cases in state and federal courts; for more than three years he served as a quasi-public defender in Lowndes County by handling, with another attorney, all court-appointed cases of indigents charged with crime. Reeves' prior criminal experience consisted of defending 25 to 30 felony cases, including four murder prosecutions. On a previous occasion he represented petitioner as his retained counsel on an armed robbery charge; the case was tried to a jury, which found petitioner not guilty. In early April 1977, Reeves was first contacted by petitioner's mother, Martha Washington, who advised him that petitioner was in jail on a murder charge, and she wanted him to represent petitioner. Arrangements for a fee were made by Mrs. Washington by her promise to transfer to him her homestead, subject to the mother's continuing occupancy. So retained, Reeves contacted petitioner at the county jail and entered upon his defense. Petitioner advised Reeves that he was innocent of the robbery-murder of J. K. Woods, and based his defense upon alibi. He furnished Reeves with the names of seven or eight witnesses who he believed would support his alibi; Reeves interviewed them. He also conferred with petitioner five or six times prior to trial.

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From the preliminary hearing, Reeves learned that the most damaging prosecution witness was Booker Cole, separately charged as an accomplice to the crime. Reeves was advised by Lucy Washington, petitioner's sister and Cole's girl friend, that Cole might repudiate his statement identifying petitioner as the person causing the victim's death. Reeves found it impossible to interview Cole before trial because of objection from Cole's attorney. Reeves' attempts to plea bargain with the district attorney were rejected, and petitioner was advised of the consequences. Although Reeves was of the opinion that petitioner's alibi was a weak defense, petitioner was nevertheless insistent upon his innocence. Before the trial Reeves was furnished a list of the prosecution witnesses, petitioner's alibi statement, and the FBI report; he was also allowed to inspect the physical evidence. He interviewed the principal prosecution witnesses other than Cole and Ben Hodo, an 18 year old black male of Ethelsville, Alabama, who was visiting relatives in the vicinity and identified petitioner as a participant in the crime. Neither petitioner nor the other members of his family were aware that Hodo was an eyewitness; Reeves, having been furnished with the wrong address, was unsuccessful in locating Hodo prior to trial.

In the six weeks that elapsed between this employment and the trial, Reeves had ample time to prepare for trial and did not seek a continuance. Nor did he feel the need of assistance or suggest that the court appoint another attorney or release himself from the case which he felt was not complicated on the facts. Two persons suggested as defense witnesses -- Douglas Harrison and Leroy Hill -- were subpoenaed by the state. These persons were supposed to corroborate petitioner's testimony that he was at Lucy Washington's house attending a party shortly after 10 p.m., the approximate time of the robbery-murder, and then left with

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them to go to another party. At trial these two witnesses surprisingly testified that they first saw petitioner and Cole at 1 a.m. and contradicted petitioner's other proof.

Reeves stated that petitioner's capital murder case was the first one he had tried under the state's new statute which mandated bifurcated trial at the guilt and punishment stages. Prior to trial he conferred informally with the circuit judge and the district attorney regarding procedure. He saw no constitutional infirmity in the new statute enacted in April 1977.

Reeves had observed jury selections in Lowndes County for eight years and knew that blacks were accustomed to serve on juries in substantial numbers. He was aware of an earlier case in which a challenge had been raised by civil rights attorneys for systematic exclusion of blacks from jury service in Lowndes County but had been withdrawn for lack of statistical evidence. In petitioner's trial, Reeves obtained a special venire of 24 persons, 6 of whom were black; on the regular panel of 34 jurors, 9 were black. From the 15 blacks on the special venire and regular panel none were selected to serve on the trial jury. After participating adequately in voir dire examination of the jury panel, Reeves exercised peremptory challenges on whites in order to bring up blacks, while the state exercised peremptory challenges on blacks to bring up whites. Twelve peremptory challenges, the maximum allowed by state law, were exercised by both the prosecution and defense. In addition, the challenges for cause which Reeves made were sustained. During the trial and jury argument Reeves voiced objections, which were largely sustained; and he demonstrated that the state's expert on physical evidence could not connect petitioner with anything he examined. Although Booker Cole's testimony was highly damaging to petitioner, Reeves attempted as effectively as possible to discredit Cole by

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emphasizing that he had made a deal with the prosecution for a prison sentence upon his pleading guilty to a lesser crime. Reeves procured a jury charge that the testimony of an accomplice should be received with caution, but the fact was that he was corroborated by Hodo and, in some respects, by Roy Thompson, employee of the deceased store owner.

After the jury returned a verdict of guilty, Reeves put on the petitioner to show he was 23 years of age, that he lived with Betty Ann Alexander, who was not his wife, but they had a three year old daughter living with them, and that he had only one previous criminal conviction, possession of marijuana. Reeves alluded to these mitigating circumstances in his statement to the jury at the punishment stage.

The record shows that after the jury returned verdict of guilty, and determined upon the death sentence, Reeves presented a motion for new trial, urging the verdict was against the weight of the evidence. The court denied this motion. Because of an automatic appeal in the death case, Reeves, who had failed to receive from Martha Washington the promised deed to her home, applied to the court, and was appointed, to represent petitioner on appeal. He ordered a complete record of the transcript, and filed briefs in the state supreme court challenging the constitutionality of Mississippi's death penalty statutes. Feeling that this was no merit in the point, Reeves did not challenge the sufficiency of the evidence on appeal. No one voiced any dissatisfaction with his repfesentation of petitioner in the trial and on appeal. Reeves was agreeable to taking the case to the United States Supreme Court if he could get help, and so advised organizations which became interested and engaged other counsel for that purpose.

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Tony Axam, an attorney specializing in capital defense cases, was offered as an expert by petitioner, was critical of Reeves' conduct of the case, particularly his failure to interview Hodo, or obtain his statement prior to trial, thought his voir dire examination of the jury was too limited, thought that Reeves failed to fully develop every possible mitigating circumstance, opined that he would have used petitioner as a witness only at the punishment stage, and stated he would not have offered petitioner to support an easily challenged alibi defense at the guilt stage of the trial. On cross-examination, Axam conceded that the trial record created a substantial issue as to guilt, and that a verdict of guilty was supported by the evidence. Axam, however, was unwilling to accept the standard that in the case of retained counsel, denial of fourteenth amendment due process should be shown only if the services of such an attorney were so deficient as to "reduce the trial to a farce and mockery." In his view, petitioner was at all events entitled to counsel's services reasonably likely to be effective, which Axam thought required special expertise in defending death cases.

II. CONCLUSIONS OF LAW ON EFFECTIVENESS OF COUNSEL

From these facts we conclude that Reeves was retained as petitioner's trial counsel. Reeves was employed by petitioner's mother, and petitioner, by his actions and conduct, readily approved of the arrangement. Indeed, Reeves was no stranger to petitioner, having successfully represented him on a previous criminal charge. It is equally clear that the court did not appoint or otherwise select Reeves to be petitioner's counsel, but regarded him as the retained attorney (Report of Trial Judge R. 3). The practice of the state judges of requiring an attorney

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once appearing for an accused to stay in the case, if at all pertinent here, relates merely to avoiding trial calendaring problems, and is not tantamount to the court's appointment of counsel. Petitioner has failed to show any state involvement in the selection of Reeves as petitioner's trial attorney or that Reeves' services were so incompetent that responsible state officials, such as the trial judge and prosecutor, were put on notice of the need to take remedial action. Given the facts disclosed by the evidence, we hold that Reeves' representation of petitioner more than satisfied the due process standard required by the fourteenth amendment, for petitioner's trial most certainly was not deprived of fundamental fairness, nor was the trial reduced to a "farce and a mockery" because of the character of Reeves' representation. Fitzgerald v. Estelle, 505 F. 2d 334 (6 Cir.), cert. denied, 422 US 1011, 45 L ed 2d 675 (1975). McDonald v. Estelle, 590 F. 2d 15[illegible] (5 Cir. 1979). Counsel for respondent, however, invites us, because of the seriousness of the death penalty, to consider that Reeves' trial services be judged, as his appellate representation must be so judged, by the sixth amendment standard applicable to court-appointed counsel. In such case, the efforts of the attorney must meet the familiar Fifth Circuit criterion of "not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Herring v. Estelle, 491 F. 2d 125, 127 (5 Cir. 1974), quoting MacKenna v. Ellis, 280 F. 2d 592, 599 (5 Cir. 1960). Reeves' formal legal training and experience in the trial of cases, especially defending felony cases, amply qualified him as reasonably likely to render reasonably effective assistance as petitioner's trial counsel, and we do not understand petitioner to contend otherwise. Rather, the argument is based upon Reeves' alleged shortcomings to provide reasonably effective assistance in this particular case.

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We have reviewed petitioner's contentions that he was not provided sixth amendment assistance of counsel and find they are wholly without merit. There is no basis for asserting that Reeves did not devote adequate time and preparation to the defense or that he was unfamiliar with the facts of the case. He pursued all leads and timely interviewed available witnesses disclosed to him by petitioner, his family, or other sources of information. After-the-fact fault-finding, or hindsight quibbling, are not enough to support petitioner's argument, but it is encumbent upon petitioner to show that there existed admissible evidence which was overlooked that could have proved helpful to the accused either on cross-examination or in his case-in-chief. Garton v. Swanson, 417 F. Supp. 697, 704 (W. D. Mo. 1976). That has not been done, nor has petitioner demonstrated any prejudice in this case because of alleged inadequacies in Reeves' pretrial investigation of witnesses. Reeves' cross-examination of Cole and Cobb, eye-witnesses who identified petitioner, revealed there was no basis for challenging their in-court identification, and their testimony was not subject to exclusion on any legal ground. To assert that Reeves could have more effectively cross-examined these two prosecution witnesses had he interviewed them prior to trial, without pointing out in what respect their testimony could be altered, is mere speculation. Furthermore, although the defense of alibi is now criticized, the fact is that such a defense was consistent with the statement which petitioner had previously made to law enforcement officers, and it was supported by independent evidence which, if believed, was sufficient to raise a reasonable doubt that petitioner was present in Woods' convenience store at the time of the robbery-murder. Even though alibi might be considered in hindsight to have been a mistaken tactical choice, nevertheless it cannot be said that

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making such a defense constituted a blunder so flagrant or egregious as to amount to ineffective representation. The reasonable tactics employed by counsel, when consistent with the known wishes of the accused, should not be constitutionally faulted for inadequacy merely because those tactics proved to be unsuccessful or may be regarded by other lawyers, from the vantage of hindsight, to have been ill chosen. Again, petitioner's claim that Reeves should have applied to the court to engage investigative services is unaccompanied by the showing of any specific reason why such services were necessary or could have aided in the defense of the accused.

The critical observations as to the manner in which Reeves conducted the voir dire examination, by failing to object to the state's use of peremptory challenges of black persons from the jury panel and by not inquiring specifically as to possible racial prejudice on the part of the panel, are not well founded. Objecting to the state's striking blacks in the exercise of peremptory challenges would have been unavailing as "the presumption in any particular case must be that the prosecutor is using the state's challenges to obtain a fair and impartial jury to try the case before the court." Swain v. Alabama, 380 US 202, 221, 13 L ed 2d 759, 773 (1965). Petitioner does not suggest how this presumption could be overcome, and it does not appear from the record that, had Reeves objected to the manner in which the state exercised peremptory challenges, he would have been upheld. Regarding inquiries made of the jury panel, it appears that the court amply covered the necessity for petitioner as well as the state to have a fair and impartial jury, free of bias and prejudice (R. 16, 18, 19, 33).

It is argued that Reeves should have objected to the court's use of the statutory bifurcated procedures established by

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the Mississippi Legislature in Miss. Code Ann. § 99-19-101, effective April 13, 1977, and that the trial should have been conducted in accordance with the procedure outlined by the state Supreme Court in Jackson v. Mississippi, 337 So. 2d 1242 (Miss. 1976). The argument is made that under Jackson the aggravating circumstances are more limited and did not include the statutorily enumerated aggravating circumstance (§ 99-19-101(5)(h)): "The capital offense was especially heinous, atrocious or cruel." No challenge of ex post facto violation could have been validly made to the use of the statutorily mandated procedure. The crime of which petitioner was convicted was committed on March 26, 1977. Section 99-19-101 of the Code became effective from and after its passage on April 13, 1977. Petitioner was indicted on May 11, 1977, and tried on May 24, 25 and 26, 1977. The provisions of the new statute were procedural only, they did not affect the substantive law and were, we think, ameliorative or of advantage to petitioner. Had Reeves contended that Jackson procedure would apply to petitioner's trial, it would have been without merit since the statute governs all capital cases tried after April 13, 1977. See Gray v. State, 351 So. 2d 1342 (Miss. 1977); Dobbert v. Florida, 432 US 282, 53 L ed 2d 344 (1977), and specifically Chief Justice Burger's concurring opinion, 433 US at 303-304, 53 L ed 2d at 363.

The argument that Reeves failed to render reasonably effective assistance during the punishment stage of the trial is unconvincing. At our hearing, petitioner did not take the stand or offer any witnesses, by affidavit or otherwise, to demonstrate that Reeves' efforts to develop mitigating circumstances were inadequate. According to the record, petitioner took the stand to give his age (23), that he was living with a lady, Betty Ann Alexander, had a three-year old daughter by her, and had only been

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as to his previous work experience with local firms, the post office, and the City of Columbus, Mississippi. It appeared that Reeves knew petitioner and his family for some time prior to the Woods' slaying, was familiar with petitioner's background, and was not restricted in offering mitigation evidence on behalf of petitioner. Petitioner claims that an in-depth investigation of the petitioner and his family prior to trial would have uncovered additional mitigating factors, yet since no evidence has been submitted to us to show the nature of other available matter favorable to petitioner, we cannot assume that it does exist. Petitioner has therefore failed to carry the burden of showing that he is entitled to a new trial on the sentencing stage because of alleged inadequacy of representation of counsel in that respect.

We hold that petitioner was accorded his right of effective counsel by Mr. Reeves, whose professional services pass muster by either the sixth or fourteenth amendment standard, and the several errors or inadequacies which petitioner would attribute to him as trial counsel fail to rise to constitutional dimensions and must be rejected.

III. THE LEGAL SUFFICIENCY OF OTHER CLAIMS FOR RELIEF

Petitioner has alternatively assigned various grounds for habeas relief which the Magistrate recommended that the court deny without an evidentiary hearing. These claims are discussed under the headings noted in the Magistrate's Report:

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A. Discriminatory Imposition of Death Penalty.

Petitioner alleges in his petition that "of the twelve persons awaiting execution in Mississippi, all are male indigents, three-fourths or nine are black and all of the victims were white," and asserts that, if given the opportunity, he could prove these facts to be true. Assuming the correctness of that statement and that all were sentenced to death under Miss Code Ann. § 99-19-101 (1972), we agree with the Magistrate's conclusion that such small numbers would be insufficient to show a pattern or practice of discrimination or arbitrariness against blacks, males, indigents and defendants accused of murdering whites as opposed to blacks, in violation of the eighth amendment prohibiting crual and unusual punishment and the Equal Protection Clause of the fourteenth amendment. Petitioner has not shown "the most compelling reasons" required by the Fifth Circuit in Spinkellink v. Wainwright, 578 F. 2d 582, 614.n.40, cert. denied --- US ---, 59 L ed 2d 796 (1979), to warrant an evidentiary hearing by a federal district court for the purpose of intervening and reviewing substantively the sentencing decision. Moreover, the Court of Appeals in Spinkellink specifically held that "if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness -- and therefore the racial discrimination -- condemned in Furman [v. Georgia, 408 US 238, 33 L ed 2d 346 (1972)] have been conclusively removed." 578 F. 2d at 613-14. This holding completely refutes petitioner's argument that the court should examine Mississippi's history prior to 1972 of restricting the death sentence predominantly to convictions of black males for murdering whites. Those convictions were authorized under the state's former sentencing statute, Miss. Code Ann. § 2217 (1956), and its predecessor statutes, which allowed a jury unfettered discretion in imposing

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Court in Peterson v. State, 268 So. 2d 335, and Capler v. State, 268 So. 2d 338, on the strength of the Supreme Court's mandate in Furman. New statutes, Miss Code Ann. § 97-3-19(2), § 97-3-65(1) and § 97-25-55(1), designed to comply with Furman's mandate, were in 1976 so construed by the state Supreme Court in Jackson v. State, supra, as to meet Furman's test of constitutionality. Since April 13, 1977, the imposition of the death penalty has been administered in accordance with the state's latest statutory procedure for a bifurcated trial of guilt and punishment provided by the 1977 statute previously discussed. We therefore regard the pre-1972 statistics asserted by petitioner as irrelevant to any present claim of discrimination or arbitrariness as they are not a valid standard for comparison with petitioner's case. Where, as here, the imposition of the death penalty is made pursuant to the presently existing Mississippi statute, it is unnecessary for the federal courts to make a case by case comparison of the facts and circumstances of petitioner's case with those in other death penalty cases.

B. Denial of Effective Assistance of Counsel.

The principal points in this portion of the Magistrate's Report and Recommendation have already been covered in previous discussion. However, certain independent arguments of a legal nature are advanced by petitioner and the Magistrate has found them to be legally insufficient. With unduly extending this memorandum, we concur in the Magistrate's conclusions set forth on pages 6 to 16 of his report. Having reviewed each of these claims, we find them to be without merit, and they form no basis for granting habeas relief.

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C. Challenge to the Constitutionality of Miss. Code Ann § 99-19-101

The state statute, the content of which is footnoted at pages 16-18 of the Magistrate's Report, is challenged on a number of grounds which the Magistrate has discussed in great detail in his report (pp. 18-32) and found to be legally insufficient. The petitioner has filed objections to each section of the Magistrate's Report. Upon review, this court is of the opinion that the decisions of the United States Supreme Court in Proffitt v. Florida, 428 US 242, 49 L ed 2d 913 (1976), rejecting eighth amendment challenges to the Florida death statute, and Gregg v. Georgia, 428 US 153, 49 L ed 2d 859 (1976), rejecting a similar eighth amendment challenge to the Georgia death statute, effectively foreclose petitioner's argument that § 99-19-101 is unconstitutional upon eighth amendment grounds. Here, as in Proffitt, petitioner's conviction is based solely on statutory aggravating circumstances, and not upon nonstatutory aggravating circumstances. Under Mississippi procedure, it is expressly mandated that the death penalty shall not be imposed "unless at least one (1) of the statutory aggravating circumstances enumerated in Section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances." Miss. Code Ann. § 99-19-103 (Supp. 1978). In Gregg, the court noted that Georgia's statute required that at least one of the ten aggravating circumstances specified by statute must be found by the jury to exist before death sentence could be imposed. The court stated: "The jury is not required to find any mitigating circumstances in order to make a recommendation of mercy that is binding on the trial court, but it must find a statutory aggravating circumstance before recommending a sentence of death." 428 US 196-97, 49 L ed 2d 887-88.

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convicted of a capital offense, the elements of which are statutory aggravating circumstances, in that the defendant must come forward with sufficient proof in mitigation to overcome the state's already proved aggravating circumstance. This, petitioner argues, shifts the burden of proof in violation of the Due Process Clause, contrary to the holding in Mullaney v. Wilbur, 421 US 684, 44 L ed 2d 508 (1975). This argument has no appeal since Mississippi's sentencing procedure does not mandatorily impose the death penalty upon the mere conviction of a capital felony-murder. Suffice it to say that the finding of one or more statutory aggravating circumstances merely authorizes the jury to consider the imposition of death should the accused not offer evidence in mitigation, but the jury is not required to find a mitigating circumstance in order to fix the punishment at life imprisonment. Clearly, no "automatic" burden is thrust upon the defendant to save his life upon conviction of a capital felony-murder.

Other arguments advanced by petitioner that Mississippi's death penalty statute is unconstitutional because it unduly restricts mitigating circumstances and does not allow the jury as the sentencing authority to consider all relevant factors cannot be maintained. § 99-19-101(1) provides, in pertinent part: "In the [sentencing] proceeding, evidence may be presented as to any matter that the court deems relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances." By § 99-19-101(5), aggravating circumstances "shall be limited" to the eight

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stances are not limited to the seven circumstances set forth in the statute. The Mississippi Supreme Court, in petitioner's appeal, Washington v. State, 361 So. 2d 61 (1978), so construed the death penalty statute by holding that "this Court is committed to the 'individualized consideration of mitigating factors' in each case, and that the only limitation on the introduction of evidence of mitigating circumstances is that it must be reasonably relevant." (Emphasis in original). 361 So. 2d at 68. This is consistent with the Supreme Court's holdings in Gregg v. Georgia, supra, 428 US at 206; Proffitt v. Florida, supra, 428 US at 250 n.8 (Opinion of Justices Stewart, Powell and Stevens), and 428 US at 260 (Opinion of Justices White, Rehnquist and Chief Justice Burger); Lockett v. Ohio, 438 US 586, 606, 57 L ed 2d 973, 991 (1978)(Plurality Opinion). In petitioner's trial, the jury was not precluded from considering all mitigating circumstances shown by the evidence.

D. Eighth Amendment Challenge to Miss. Code Ann. § 99-19-105(3)(c).

Petitioner claims that the above statute as applied by the Mississippi Supreme Court calls for a comparison of petitioner's case only to cases where the death penalty is imposed and not to cases where defendants charged with capital murder are found guilty of lesser included offenses or receive sentences of life imprisonment and results in the arbitrary and capricious imposition of the death penalty. This identical contention was rejected by the Supreme Court in Proffitt, supra, 428 US at 259, n.16, where the court stated: "As we noted in Gregg v. Georgia [citation omitted], this problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty."

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We uphold the Magistrate's conclusion that in petitioner's trial there were no errors of a constitutional nature committed by the trial court. The trial was, as found by the state Supreme Court on appeal, in accordance with the state's new death penalty statute, and the verdicts of both guilt and punishment are supported by substantial evidence. Specifically, the jury was not precluded from considering all mitigating factors shown by the evidence, whether or not they were directly brought to the attention by the court's instruction C-20. It is to be noted that the court excluded no evidence which was offered in mitigation, and that instruction C-20, while it expressly required the jury to "consider only" one or more of the two pertinent statutory aggravating circumstances before voting the death penalty, did not restrict the jury to considering only petitioner's lack of significant history of prior criminal activity and his age as mitigating circumstances. Moreover, this instruction was not objected to at trial, and under it the jury was free to consider all mitigating evidence which petitioner saw fit to offer.

We expressly approve all other aspects of the Magistrate's Report recommending that the petition for writ of habeas corpus be denied, and we find from the record of the state trial and the evidence adduced before us that petitioner received a trial in the Circuit Court of Lowndes County, Mississippi, not tainted with constitutional error, and we therefore hold that his petition for writ of habeas corpus should be denied.

Let an order issue accordingly.

This, 19th day of December, 1979.

William C. Keady
Chief Judge
United States District Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JOHN LEWIS WASHINGTON, Petitioner

V. NO. GC 79-93-K-P

JOHN C. WATKINS, ET AL, Respondents

ORDER

The court has before it the petition of John Lewis Washington for writ of habeas corpus, the response thereto of respondents, petitioner's traverse, the record of petitioner's trial in the state courts of Mississippi, both trial and appellate, the Magistrate's Report and Recommendation, and the evidence adduced at evidentiary hearing conducted in this court, and for the reasons set forth in Memorandum Opinion this date issued, we affirm the report and recommendation of the United States Magistrate and incorporate his report into the opinion of this court by reference, and hold that petitioner is not entitled to the relief sought. It is accordingly

ORDERED

That the petition for writ of habeas corpus of John Lewis Washington, petitioner herein, be and the same is hereby denied.

This, 18th day of December, 1979.

William C. Keady
Chief Judge
United States District Court

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GREENVILLE DIVISION

JOHN LEWIS WASHINGTON,

Plaintiff

V. NO. GC 79-93-K-P

JOHN C. WATKINS, ET AL,

Defendants

REPORT AND RECOMMENDATION

In this petition for a writ of habeas corpus, John L. Washington, a black male, attacks the constitutionality of his May 1977 conviction in the Circuit Court of Lowndes County of the crime of felony murder and the sentence of death imposed upon him pursuant thereto. By order entered herein on June 1, 1979, this cause was referred to the United States Magistrate for report and recommendation on the necessity vel non of evidentiary hearing on petitioner's claims for habeas relief.

I. MOTION TO DISMISS

Respondents have filed a motion to dismiss the petition on the grounds that petitioner has failed to exhaust available state court remedies with regard to certain of his claims for relief, viz., ineffective assistance of counsel in failing to challenge petitioner's indictment for lack of adequate notice as to the aggravating circumstances to be proved by the state, denial of due process by the trial court permitting the state to introduce evidence on and to argue issues of aggravation not listed in petitioner's indictment, and denial of due process

and violation of the Eighth Amendment prohibition against cruel and unusual punishment by the failure of the trial court to require specific written findings of fact by the jury as to statutory aggravating and mitigating circumstances. In a supplemental memorandum in support of their motion to dismiss, respondents acknowledge, however, that subsequent to filing of their motion to dismiss the Mississippi Supreme Court in Voyles v. Watkins, No. 50,648, denied an application for leave to file a petition for writ of error coram nobis presenting, inter alia, claims virtually identical to those not presented to the Mississippi Supreme Court by petitioner. Exhibit D to respondents' First Supplemental Memorandum in Support of Motion to Dismiss Petition For Writ of Habeas Corpus, Petition For Writ of Error Coram Nobis, And/Or Writ of Habeas Corpus filed in Voyles v. Watkins, ¶11(g) at 7, and ¶¶12(e) and (g) at 10-11.

> Petitioners for federal habeas corpus need not exhaust state remedies when it is plain that resort to the state courts would be futile. If the state's highest court has recently rendered an adverse decision in an identical case, and if there is no reason to believe that the state court will change its position, a federal court should not dismiss the petition for federal habeas corpus for failure to exhaust remedies.

Layton v. Carson, 479 F.2d 1275, 1276 (5 Cir. 1973). In view of the recent refusal of the Mississippi Supreme Court to address claims identical to those raised by petitioner here but not presented to that court, it is apparent that any application by petitioner to the Mississippi Supreme Court for leave to file a petition for a writ of error coram nobis asserting such claims would be futile, and respondents' motion to dismiss accordingly should be denied.[1/]

1/ Petitioner's remaining claims for habeas relief have been presented to the Mississippi Supreme Court either by direct appeal, by application for leave to file a petition for a writ of error coram nobis, summarily denied on May 25, 1979, Washington v. Watkins, No. 50,401, or by both.

II. CLAIMS FOR RELIEF

A. Discriminatory Imposition of Death Penalty.

Petitioner contends that the death penalty under Miss. Code Ann. §99-19-101 is being imposed in a discriminatory manner against blacks, males, indigents, and defendants convicted of murdering whites as opposed to blacks, in violation of the equal protection clause of the Fourteenth Amendment and the Eighth Amendment prohibition against arbitrary and capricious imposition of the death penalty. In support of this claim, petitioner alleges that "[o]f the twelve persons awaiting execution in Mississippi, all are male indigents, three-fourths or nine are black and all of the victims were white." As to petitioner's claim under the Eighth Amendment,

> To allege discriminatory application of the death penalty, as meant in the context of this case, is to argue that defendants who have murdered whites have received the death penalty when other defendants who have murdered blacks, and who are equally or more deserving to die, have received life imprisonment. In order to ascertain through federal habeas corpus proceedings if the death penalty had been discriminatorily imposed upon a petitioner whose murder victim was white, a district court would have to compare the facts and circumstances of the petitioner's case with the facts and circumstances of all other Florida death penalty cases involving black victims in order to determine if the first degree murderers in those cases were equally or more deserving to die. The petitioner thus requests the same type of case-by-case comparison by the federal judiciary that we have previously rejected in considering the petitioner's contention that Florida's death penalty is being imposed arbitrarily and capriciously. We need not repeat the myriad of difficult problems, legal and otherwise, generated by such federal court intrusion into the substantive decision making of the sentencing process which is reserved to the Florida state courts under Section 921.141. As we previously

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> noted, this Court reads Furman, Gregg, Proffitt, Jurek, Woodson, and Roberts as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness - - and therefore the racial discrimination - - condemned in Furman have been conclusively removed. Florida has such a statute and it is being followed. The petitioner's contention under the Eighth and Fourteenth Amendments is therefore without merit.

Spinkellink v. Wainwright, 578 F.2d 582, 613-14 (5 Cir. 1978), cert. denied, _____ U.S. _____, 59 L.Ed.2d 796 (1979). From an Eighth Amendment standpoint, similar consideration would obtain with regard to petitioner's claim of discriminatory application of the death penalty to black, indigent, and male defendants.

Petitioner's equal protection claims of allegedly discriminatory application of the death penalty against blacks, males, and indigents are not far removed from his Eighth Amendment claim, i.e., "at its core lies the charge of arbitrary and capricious conduct." Spinkellink, supra, 578 F.2d at 616.

> If a petitioner can show some specific act or acts evidencing intentional or purposeful racial discrimination against him, see Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-68, 97 S.Ct. 555, 564-565, 50 L.Ed.2d 450 (1977), either because of his own race or the race of his victim, the federal district court should intervene and review substantively the sentencing decision. We emphasize once again . . . that this Court anticipates that such intervention will be infrequent and only for the most compelling reasons. Mere conclusory allegations, as the petitioner makes here, such as that the death penalty is being "administered arbitrarily and discriminatorily to punish the killing of white persons as opposed to black persons," . . . do not constitute such reasons and would not warrant an evidentiary hearing. This is so on Eighth Amendment grounds as well as on Fourteenth Amendment equal protection grounds, because the intrusionary effect would be the same.

Spinkellink, supra, 578 F.2d at 614 n.40. Reasoning identical

to the above applies with regard to the equal protection claims alleging discrimination on the basis of sex and wealth.

> If a petitioner in federal habeas corpus proceedings can point to some specific act or acts evidencing intentional or purposeful discrimination against him on the basis of sex or wealth, the district court would be justified in looking behind the substantive sentencing decisions of the state criminal justice system. Conclusory allegations, as the petitioner makes here, such as that the death penalty is being " 'exacted pursuant to a pattern or practice of Florida prosecuting authorities, courts, juries, and Govenors to discriminate on grounds of sex and poverty in the administration of capital punishment,' " . . . do not constitute sufficiently compelling reasons for district court intrusion. Under these circumstances, an evidentiary hearing, either on Eighth Amendment or on Fourteenth Amendment equal protection grounds, would not be warranted. See Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, 429 U.S. at 266-69, 97 S.Ct. at 564-65.

Spinkellink, supra, 578 F.2d at 616-17 n.42. As further explained by a two-judge majority in another Fifth Circuit decision by a different panel,

> this sort of challenge must show intentional arbitrariness or discrimination under the standards of Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), but such a showing, as the Arlington Heights Court made clear, see 429 U.S. at 270, 97 S.Ct. 555, can rely on a pattern or practice of discrimination or arbitrariness and need not identify an intentional discriminatory act or malevolent actor in the defendant's particular case. . .. In addition, as our citation of Castenada v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), indicated, Spinkellink v. Wainwright, 578 F.2d at 615, if a disportionate or arbitrary impact results from constitutional but relatively unstructed sentencing procedures that permit the exercise of a good deal of discretion, we will presume discriminatory intent and place the burden on the state to explain how it has conformed its decisions by death sentences to some acceptable, neutral criterion.

Jurek v. Estell, 593 F.2d 672, 685 (5 Cir. 1979).

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Assuming the correctness of petitioner's statistics as to the characteristics of those persons under sentence of death in Mississippi, and further assuming that all 12 such persons were sentenced to death under Miss. Code Ann. §99-19-101, such small numbers would be insufficient to demonstrate such a pattern or practice of discrimination or arbitrariness such as would require evidentiary hearing in view of the obvious myriad of variables involved in the prosecution and sentencing of defendants in distinct capital cases. Petitioner's meager numbers do not present "the most compelling reasons," Spinkellink, supra, 578 F.2d at 614 n.40, necessary to warrant an evidentiary hearing on this claim by petitioner.

B. Denial of Effective Assistance of Counsel.

1. Failure to Appoint Two Attorneys to Represent Petitioner.

Petitioner claims his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment due process and equal protection rights were violated by the trial court's failure to appoint two attorneys to represent him as authorized by Miss. Code Ann. §99-15-17. Respondents contend that this claim is wholly without merit as petitioner was represented at trial by retained counsel. Respondents' position is supported by record, Report of Trial Judge at 3. Assuming, however, that petitioner's trial counsel was appointed, this claim adds nothing to petitioner's remaining claims concerning ineffective assistance of counsel as the standard for effective assistance is the same whether a defendant is represented by one of several attorneys.

The equal protection clause of the Fourteenth Amendment prohibits disparate treatment only between classes of persons, rather than individuals, e.g., Ross v. Moffitt, 417 U.S. 600, 609, 41 L.Ed. 341, 350 (1974), while due process

in this context is concerned with fundamental fairness between the state and petitioner, id. If petitioner was appointed counsel whose assistance proved effective, failure to appoint additional counsel cannot be said to be unfair and to have deprived petitioner of any due process right.

2. Alleged Failings of Counsel.

As a preface to this claim by petitioner, it must be noted, as pointed out above, that there is a conflict between the parties as to whether petitioner's trial counsel was appointed or retained. The standard of effective assistance of appointed counsel in the Fifth Circuit is "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Herring v. Estell, 491 F.2d 125, 127 (5 Cir. 1974), quoting MacKenna v. Ellis, 280 F.2d 592, 599 (5 Cir. 1960). However, "the standard of reasonably effective assistance of counsel . . . covers a greater range of counsel errors than does the fundamental fairness standards of the due process concept solely embodied within the Fourteenth Amendment." Fitzgerald v. Estell, 505 F.2d 1334, 1336 (5 Cir.), cert. denied, 422 U.S. 1011, 45 L.Ed.2d 675 (1975). In other words,

> whenever the actions of retained counsel operate to deprive the trial of fundamental fairness then the Fourteenth Amendment due process had been violated notwithstanding any kind of specific involvement by a particular state official. If a retained counsel's actions do not sap the proceedings' fundamental fairness, but are challenged as less than reasonably effective in violation of the Sixth Amendment, state involvement through actual or constructive awareness of error by the judge, prosecutor, or other responsible official who could have corrected it, must be shown.

Fitzgerald, supra, 505 F.2d at 1338. Stated differently, a petitioner

> claiming denial of due process invoking the Fourteenth rather than the Sixth

> Amendment . . . would be entitled to relief only if he could show the errors complained of were so obvious and prejudicial as to reduce the trial to a farce and a mockery.

McDonald v. Estell, 590 F.2d 153, 155 (5 Cir. 1979). Under either standard, i.e., Fourteenth Amendment due process or Sixth Amendment right to reasonably effective assistance of counsel, the shortcomings of counsel asserted by petitioner and separately addressed below are not such as to require evidentiary hearing.

a. Counsel "Failed to Adequately Preserve Exceptions."

No Specific failure on the part of trial counsel is alleged by petitioner, and as a general rule mere conclusory allegations are insufficient to support a claim of habeas relief. E.g., United States v. Carey, 571 F.2d 1343 (5 Cir. 1978); Cunningham v. Estell, 536 F.2d 82 (5 Cir. 1976). The transcript of petitioner's trial indicates that numerous objections were made by his counsel. (R. 42, 59, 60, 62, 72, 77, 114, 229, 307). It also should be noted that failure to object, standing alone, is not indicative of ineffective assistance of counsel, as "[c]ounsel's failure to object . . . is not cause for complaint [where] evidence was properly admissible." Logan v. Cox, 317 F. Supp. 61, 62 (W.D. Va. 1970).

b. Counsel "Failed to Adequately Challenge Tainted Eyewitness Testimony."

Only one eyewitness, Ben Hodo, located petitioner at the scene of the crime. Hodo positively identified petitioner as the man he saw with a "long gun" in a lighted alley near the scene of the robbery involved in the charges against petitioner and shortly after the robbery had taken place. (R. 190-92). Hodo, 18 years old at the time (R. 189) stated that he looked petitioner in the face (R. 192), and that he

looked at him for approximately 10 seconds (R. 194). On cross-examination, Hodo testified that in early April 1977, he identified petitioner from a series of photographs as the man he had seen in the alley on the night of March 26, 1977 (R. 196), and that he again identified petitioner from a series of photographs shown to him by the same policeman on the morning of Hodo's testimony. (R. 197). Hodo couldn't recall how many photographs he had viewed on the first occasion, but stated that on the morning of his testimony, he had identified petitioner from photographs of eight people. (R. 198). Petitioner's trial counsel then asked Hodo

> Q. Let me ask you this: could looking at those photographs enable, having picked out Johnny Washington twice in photographs, are you identifying him now by reference to those photographs or by what you saw in the alley?
>
> A. What I saw in the alley.
>
> Q. You are positive?
>
> A. Yes.
>
> (R. 198-99).

Any failure by petitioner's trial counsel to challenge further the identification testimony of Hodo cannot be said to be outside the range of reasonably effective assistance of counsel in light of the approval of use of photographic array identification in Simmons v. United States, 390 U.S. 377, 19 L.Ed.2d 1247 (1968), see Manson v. Brathwaite, 432 U.S. 98 and 105 n.8, 53 L.Ed.2d 140 and 148 n.8 (1977), and further in view of the fact that since petitioner's sole defense at trial was alibi, petitioner's counsel might reasonably have felt that further challenge to Hodo's positive identification testimony could only serve to reinforce such testimony after counsel had made his point as to the manner in which Hodo had identified petitioner.

c. Counsel "Failed to Challenge Systematic Exclusion of Blacks From the Jury."

Here, petitioner again makes a wholly conclusory allegation as to ineffective assistance of counsel. The conclusory nature of this allegation by petitioner is emphasized by petitioner's motion for discovery, addressed infra, whereby petitioner seeks, inter alia, discovery of "records reflecting the number and race and sex of the jurors who made the Circuit Court venire in this case and also between the years 1971 and the present, which are essential proof to petitioner's allegations that a pattern existed in which blacks and women were systematically excluded from service as jurors. Depositions (sic) request for inspection and/or admissions of the jury commissioners and the Circuit Clerk of Lowndes County, Mississippi will be essential to show the court that these allegations are true." In other words, petitioner is baldly asserting that petitioner's trial counsel rendered ineffective assistance in failing to challenge the exclusion of blacks from the jury when petitioner has absolutely no facts at hand to support a determination that such a challenge should have been made. Fact pleading is required in federal habeas corpus petitions, Rule 2(c), Rules Governing Section 2254 Cases. Furthermore, the record of petitioner's trial demonstrates that 12 blacks were included in the regular jury panel summoned for petitioner's trial, and that three additional blacks were on the special venire (R. 38) summoned by order entered on petitioner's motion therefor. (R. 5, 6). The Fifth Circuit has "[d]eclined to find a lack of effective assistance of counsel arising from the bare fact of failure to challenge the array of petit jurors." Arnold v. Wainwright, 516 F.2d 964, 971 (5 Cir. 1975); see also Buchannon v. Wainwright, 474 F.2d 1006 (5 Cir. 1973).

Furthermore, the Fifth Circuit has rejected an attempt to challenge the composition of grand and petit juries by a petitioner alleging as cause for failure timely to challenge the jury composition the asserted ineffective assistance of trial counsel in failing to object to the jury composition:

> petitioner has not demonstrated cause for failing to make a timely challenge. His only allegation in this regard is that his trial attorney provided ineffective assistance of counsel in failing to so object. This assertion must be rejected, however, for, if accepted, it would effectively eliminate any requirement of showing cause at all. If a petitioner could not demonstrate any legitimate cause, he would only have to raise the spectre of ineffective assistance of counsel to get his challenge heard. This we refuse to sanction.

Lumpkin v. Ricketts, 551 F.2d 680, 682-83 (5 Cir.), cert. den., 434 U.S. 957, 54 L.Ed.2d 316 (1977).

d. Counsel "Failed to Ask For Necessary Instructions Or to Object to the Failure of the Court to Give Such Instructions as to What 'Wilfully' in the Indictment Means."

Petitioner again makes only conclusory allegations in support of this claim, other than the specific allegation of counsel's failure to request an instruction on the meaning of the word "wilfully" in the indictment returned against petitioner. Counsel, however, cannot be faulted for failure to request an instruction on the definition of "wilfully" as wilfulness, or intent, is not an element of the charge against petitioner. Miss. Code Ann. §97-3-19(2)(e), the statute under which petitioner was indicted, provides:

> (2) The killing of human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> . . . .
>
> (e) When done with or without any design to effect death, by any person engaging in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies.

Miss. Code Ann. §97-3-19(2)(e) (Supp. 1978). In Gray v. State, 351 So.2d 1342 (Miss. 1977) the court held that:

> The [trial court] did not err in refusing the instruction . . . because intent to kill and murder a victim is not a necessary element in the crime of capital murder when

> the defendant kills his victim in the commission of the crime . . . or in an attempt to commit the crime . . ..

351 So.2d at 1348. See Sessum v. State, 221 So.2d 368 (Miss. 1969) (predecessor statute); Carrol v. State, 183 So. 703 (Miss. 1938) (predecessor statute). Inclusion of the word "wilfully" in the indictment returned against petitioner[2/]

2/ The indictment returned against petitioner states in pertinent part that:

> JOHNNY LEWIS WASHINGTON late of the county aforesaid, on or about the 28th day of March in the year of our Lord, 1977, did then and there wilfilly, unlawfully, feloniously and of his malice aforethought kill and murder a human being, J. K. WOODS, WITHOUT AUTHORITY AT LAW AND NOT IN NECESSARY SELF-DEFENSE WHILE HE, THE SAID JOHNNY LEWIS WASHINGTON WAS THEN AND THERE ENGAGED IN THE COMMISSION OF THE CRIME OF ARMED ROBBERY IN VIOLATION OF SECTION 97-3-19(2)(E) OF THE MISSISSIPPI CODE ANNOTATED, 1972, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

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accordingly is surplusage, 42 CJS Indictments and Informations §263 at 1287, see Schloder v. State, 310 S.2d 721 (Miss. 1975), and counsel accordingly did not fail to provide reasonably effective assistance in failing to request a definition thereof.

e. Counsel's "Failure to Demand Complete Transcription of the Proceedings So That the Appellate Court Could Effectively Review the Entire Proceedings."

This allegation by petitioner is completely refuted by the record. A letter of May 31, 1977 from petitioner's trial counsel to the court reporter present at petitioner's trial states:

> On May 25, 1977, Johnny L. Washington was convicted of the crime of Capital Murder, in the Circuit Court of Lowndes County, Mississippi, and on the following day sentenced to death in accordance with the law, by Judge Harvey Buck.

> You are hereby requested and directed to transcribe your notes and file them with the Clerk of said Court, as provided by law, in said above styled and numbered cause, as the said Johnny L. Washington desires to prosecute an appeal from said judgment and sentence. (R. 363).

f. Counsel "Failed to Adequately Prepare and Investigate the Facts at Issue."

Petitioner points to no specific lack of preparation and investigation by trial counsel, nor is any allegation made as to the manner in which such alleged failure of preparation and investigation prejudiced petitioner at trial. See Davis v. Alabama, 596 F.2d 1214, 1222-23 (5 Cir. 1979). Review of the transcript of petitioner's trial demonstrates no lack of familiarity by trial counsel with the facts of petitioner's case. Moreover, trial counsel called five witnesses in an attempt to establish petitioner's alibi defense.

g. Counsel "Failed to Challenge the Corroboration For the Testimony of Accomplice."

By far the most damaging testimony to petitioner presented at his trial was that of Booker T. Cole, who also was indicted in connection with the armed robbery in which the killing for which petitioner was convicted occurred. Cole testified that he and petitioner committed the robbery in question, and that petitioner committed the killing in the course of the robbery.

> The law is settled in this state that the uncorroborated testimony of an accomplice will support a guilty verdict, but the rule requires that such uncorroborated testimony should be viewed with great caution and suspicion and that it must be reasonable and not improbable or self-contradictory or substantially impeached.

Thomas v. State, 340 So.2d 1, 2 (Miss. 1976). Cole's testimony was entirely reasonable, was not self-contradictory, and was not substantially impeached. In fact, his testimony was

corroborated by others, viz., Ben Hodo, who located petitioner near the scene of the crime with a gun, shortly after the occurrence of the crime, and Roy Thompson, an employee at the establishment where the crime occurred, who testified as to events concerning commission of the crime. Under these circumstances, any failure by trial counsel to challenge the corroboration for Cole's testimony is entirely understandable.

h. Counsel "Failed to Raise, On a Motion for Rehearing, a Recent, Relevant Supreme Court Decision That Was Handed Down Between Filing of the Appeal and Decision of the Court."

The decision in question is Lockett v. Ohio, 430 U.S. 586, 57 L.Ed.2d 973 (1978). Lockett was decided on July 3, 1978; the Mississippi Supreme Court decided petitioner's appeal on July 12, 1978. Lockett, however, was noted and distinguished by the Mississippi Court in its decision on plaintiff's appeal. Washington v. State, 361 So.2d 61, 67 (1978), cert. denied,_____US. _____ (April 16, 1979). Any shortcoming of petitioner's appellate representation in this regard accordingly is insubstantial and does not rise to constitutional proportions.

i. Counsel "Failed to Object to Prejudicial Statements by the Prosecution."

Once again, no specific allegations are made by petitioner in support of this claim. The transcript of petitioner's trial reveals that petitioner's counsel in fact did object to certain prejudicial comments in the State's closing argument and that his objection was sustained. (R. 307). Review of the transcript of the State's argument at both stages of the bifurcated trial reveals no failure by petitioner's trial counsel to object such as to render his representation of petitioner not reasonably effective.

j. Counsel "Failed to Challenged (sic) the Indictment for Lack of Adequate Notice as to What Aggravation Circumstances Were to be Proved by the State."

Here, as in Spinkellink v. Wainwright, supra, Petitioner "cites no case, federal or state, which requires the prosecutor to list in the indictment the aggravating circumstances on which he will rely in seeking the death penalty." Spinkellink, supra, 578 F.2d at 609. While the Spinkellink court did not reach the issue of whether or not the Constitution required aggravating circumstances to be listed in a capital indictment, it did point out that the Florida death penalty statute provided notice to Spinkellink of what aggravating circumstances could be considered in the sentencing phase of his trial. Id. at 609-10. Mississippi's statute, like Florida's, lists the aggravating circumstances which must be proved in the sentencing phase of a capital trial to permit imposition of the death penalty. Miss. Code Ann. §§99-19-101(5)(a)-(h). Counsel's failure to challenge petitioner's indictment for lack of notice as to aggravating circumstances therefore cannot fairly be said to be beyond the range of reasonably effective assistance of counsel.

> The role of the District Court presented under allegations of ineffective assistance of counsel is not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance. This does not mean that it should second guess reasoned choices between trial tactics not does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success. It is sufficient if he is prepared and conducts the defense with reasonable knowledge and skill with an exercise of knowledgeable choices of trial tactics.

Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9 Cir. 1977), cert. denied, _____ U.S. _____, 59 L.Ed.2d 793 (1979).

The record of petitioner's trial and appeal demonstrates that petitioner received reasonably effective representation, notwithstanding petitioner's conclusory allegations to the contrary.

C. Challenge to Constitutionality of Mississippi Code Annotated Section 99-19-101. 3/

3/ "§99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutionsof the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5), of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

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(h) The capital offense was especially heinous, atricious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime."

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1. Eighth Amendment Challenge to Miss. Code Ann. §99-19-101(1).

Miss. Code Ann. §99-19-101(1) provides that:

> In the [sentencing] proceeding evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances.

Petitioner contends that this portion of the death statute permits unguided and unrestrained discretion in imposition of the death penalty in that the statute allows introduction of evidence not directly relevant to the eight statutory aggravating circumstances, Miss. Code Ann., §99-19-101(5)(a)-(h). Petitioner's argument is foreclosed by Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913 (1976), rejecting Eighth Amendment challenges to the Florida death statute,[4/]

4/ The Florida statute provides:

"§921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty. - - Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. - - After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death. - - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) Review of judgment and sentence. - - The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances. - - Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) Mitigating circumstances. - - Mitigating circumstances shall be the following:

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(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime." Fla. Stat. Ann. §921.141.

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and Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859 (1976), rejecting similar challenges to the Georgia death statute.[5/]

5/ The Georgia statute pertinent to this contention provides:

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting

> attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment." Ga. Code Ann. § 27-503.

In Proffitt the court noted that "[e]vidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances," 438 U.S. at 248, 49 L.Ed.2d at 921, and further pointed out that

> The petitioner notes further that Florida's sentencing system fails to channel the discretion of the jury or judge because it allows for consideration of nonstatutory aggravating factors. In the only case to approve such a practice . . . the Florida court recast the trial court's six nonstatutory aggravating factors into four aggravating circumstances - - two of them statutory. As noted earlier, it is unclear that the Florida court would ever approve a death sentence based entirely on nonstatutory aggravating circumstances.

428 U.S. at 256 n.14, 49 L.Ed.2d at 925 n.14. Proffitt held that "[o]n their face these procedures [the Florida death statutes] appear to meet the constitutional deficiencies identified in Furman." 428 U.S. at 251, 49 L.Ed.2d at 922. Here, as in Proffitt, petitioner's conviction is based solely on statutory aggravating circumstances, and a death sentence based solely on nonstatutory aggravating circumstances would

be contrary to the plain terms of Miss. Code Ann. §99-19-103.[6]

6/ Miss. Code Ann. §99-19-103 (Supp. 1978) provides in part:

> Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed.

In Gregg, the court noted that

> Georgia . . . narrow[ed] the class of murderer subject to capital punishment by specifying ten statutory aggravating circumstances, one of which must be found by the jury to exist beyond reasonable doubt before a death sentence can ever be imposed. In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. §27-2534.1(b)(Supp. 1975). The jury is not required to find any mitigating circumstances in order to make a recommendation of mercy that is binding on the trial court, see §27-2302 (Supp. 1975), but is must find a statutory aggravating circumstance before recommending a sentence of death.

428 U.S. 196-97, 49 L.Ed.2d 887-88. The court in Gregg then rejected a challenge virtually identical to that raised here:

> The petitioner objects, finally, to the wide scope of evidence and argument allowed at the presentence hearings. We think that the Georgia Court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far ranging argument. . . . So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

428 U.S. at 203-204, 49 L.Ed.2d at 891-92.

2. Due Process Challenges to "Presumption of Death" of Section 99-19-101.

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Petitioner contends that §99-19-101 creates a presumption of death once a defendant such as petitioner is convicted of a capital offense the elements of which are statutory aggravating circumstances.[7/] Petitioner reasons that such

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7/ See Miss. Code Ann. §97-3-19(2)(e), supra, at p. 11 , and Miss. Code Ann. §99-19-101(5)(d), supra, n.3.

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a set of circumstances results in "automatic death", Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus at 9, unless defendant comes forward with sufficient proof in mitigation to overcome the State's already proved aggravating circumstance. The effect of this, according to petitioner, is to shift the burden of proof to the defendant in violation of the due process clause.

The basic failing of petitioner's thesis is that there is no required "automatic death" under the Mississippi statutes once the State has proved statutory aggravating circumstances.

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Gregg v. Georgia, supra, 428 U.S. at 199, 49 L.Ed.2d at 888. A defendant accordingly has no burden of proof, in the traditional sense, at the sentencing hearing; however,

> A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.
>
> Thus, in order to meet the requirements of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances.

Jurek v. Texas, 428 U.S. 262, 271, 49 L.Ed.2d 929, 938 (1976).

Petitioner's reliance on Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508 (1975), is not well taken. Mullaney invalidated a Maine law which "require[d] a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter." 421 U.S. at 703, 44 L.Ed.2d at 522. In essence, the holding of the court was that due process requires the state to prove beyond a reasonable doubt every "fact . . . critical to criminal culpability." 421 U.S. at 702, 44 L.Ed.2d at 522. Under the Mississippi death statutes, a defendant does not have the burden of proving any fact; he is, of course, entitled to present at the sentencing phase any relevant evidence as to why the death penalty should not be imposed, as required by the Eighth Amendment.

3. Eighth Amendment Proportionality Challenge.

The Eighth Amendment requires that "punishment must not be grossly out of proportion to the severity of the crime." Gregg v. Georgia, supra, 428 U.S. at 173, 49 L.Ed.2d at 875. Although not specifically stated, petitioner's proportionality challenge to his sentence of death apparently is based upon the lack of any requirement of intent to kill as an element necessary to imposition of his death penalty. Although not addressing the question presented here, the court in Gregg noted that the suitability of the death penalty for various crimes is a question particularly suited to resolution by state legislatures, 428 U.S. at 174-87, 49 L.Ed.2d at 875-83, and that "a heavy burden rests on those who would attack the judgment of the representatives of the people." 428 U.S. at 175, 49 L.Ed.2d at 876. In Mississippi, "[a]pparently the State . . . wishes to supply a substantial incentive

to those engaged in robbery to leave their guns at home and to persuade their co-conspirators to do the same in the hope that fewer victims of robberies will be killed." Gregg v. Georgia, supra, 428 U.S. at 221 n.10, 49 L.Ed.2d at 901 n.10 (concurring opinion by Justice White).

The specific question raised by petitioner has never been addressed by the Supreme Court. In Lockett v. Ohio, supra, the petitioner, an aider and abetter to an armed robbery in which the victim was unintentionally shot and killed, was convicted under Ohio law as a principal and was sentenced to death. Although Lockett's death sentence was reversed on other grounds, three members of the court discussed the issue in separate concurring opinions. Justice White expressed the view that the Eighth Amendment was violated by imposition of the death penalty "without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624, 57 L.Ed.2d at 1002. Justice Blackmun expressed a contrary opinion.

> I do not find entirely convincing the disproportionality rule embraced by my Brother White. The rule that a defendant must have had actual intent to kill, in order to be capitally sentenced, does not explain why such intent is the sole criterion of culpability for Eighth Amendment purposes. What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally? What if a robbery participant, in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results? May we as judges say that for Eighth Amendment purposes the absence of a "conscious purpose of producing death," post, at

628, 57 L Ed 2d, at 1004, transforms the culpability of those defendants' actions?

> Applying a requirement of actual intent to kill to defendants not immediately involved in the physical act causing death, moreover, would run aground on intricate definitional problems attending a felony murder. What intention may a State attribute to a robbery participant who sits in the getaway car, knows that a loaded gun will be brandished by his companion in the robbery inside the store, is willing to have the gun fired if necessary to make an escape but not to accomplish the robbery, when the victim is shot by the companion even though not necessary for escape? What if the unarmed participant stands immediately inside the store as a look-out, intends that a loaded gun merely be brandished, but never bothered to discuss with the triggerman what limitations were appropriate for the firing of the gun? What if the same lookout personally intended that the gun never be fired, but, after his companion fires a fatal shot to prevent the victim from sounding an alarm, approves and takes off?
>
> The requirement of actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate "constitutionalized" definition of the requisite mens rea, involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States' criminal law. And such a rule, even if workable, is an incomplete method of ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of mens rea.

438 U.S. at 614 n.2, 57 L.Ed. 2d 996 n.2 (separate concurrence of Justice Blackmun). Justice Rehnquist reached a similar conclusion in more direct terms.

> I finally reject the proposition urged by my Brother White in his separate opinion, which the plurality finds it unnecessary to reach. That claim is that the death penalty, as applied to one who participated in this murder as Lockett did, is "disproportionate" and therefore violative of the Eighth and Fourteenth Amendments. I know of no principle embodied in those Amendments, other than perhaps one's personal notion of what is a fitting punishment

> for a crime, which would allow this Court to hold the death penalty imposed upon her unconstitutional because under the judge's charge to the jury the latter were not required to find that she intended to cause the death of her victim. As my Brother White concedes, approximately half of the States "have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." Ante, at 625, 57 L Ed 2d, at 1002. Centuries of common-law doctrine establishing the felony-murder doctrine, dealing with the relationship between aiders and abettors and principals, would have to be rejected to adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of "an eye for an eye, a tooth for a tooth," as a guide for minimum sentencing, there is nothing in the prohibition against cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.

438 U.S. at 635-36, 57 L.Ed.2d at 1009 (separate concurrence of Justice Rehnquist).

It goes without saying that it is somewhat difficult to decide a constitutional issue on the basis of conflicting views of individual members of the court. The concurring opinions of Justices Rehnquist and Blackmun in Lockett, however, seem to be more convincing and more compatible with the legislative role in determining appropriate punishment for crimes, leaving lack of intent to kill as a proper mitigating circumstance in the punishment phase of a capital murder prosecution. See Lockett v. Ohio, supra, 438 U.S. at 608, 57 L.Ed.2d at 992 (plurality opinion).

4. Denial of Opportunity of a Presentence Report.

Petitioner contends that the sentencing procedures of §99-19-101 denied him the benefits of a presentence report in violation of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. In Gregg v. Georgia, supra, the court rejected an Eighth Amendment challenge to Georgia's capital sentencing procedures which, for the purposes of this contention by petitioner, are identical to those of

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§99-19-101. The court in Gregg found that the Georgia procedures provided "the sentencing authority . . . adequate information and guidance," 428 U.S. at 195, 49 L.Ed.2d at 887, sufficient to eliminate arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment. While other capital sentencing procedures might adequately control sentencing discretion within the confines of the Eighth Amendment, id., perhaps including use of presentence reports, such are not required by the Eighth Amendment.

Petitioner's contention based on equal protection grounds fails because of the obvious difference in this state between jury sentencing in capital cases and judge sentencing in non-capital cases. See Gregg v. Georgia, supra, 428 U.S. at 189-94, 49 L.Ed.2d at 881-86; Proffitt v. Florida, supra, 428 U.S. at 252 n.9, 49 L.Ed.2d at 923 n.9: "[b]ecause the trial judge imposes sentence, the Florida court has ruled that he may order preparation of a presentence investigation report to assist him in determining the appropriate sentence." Id. (emphasis added).

5. Due Process Challenge to Miss. Code Ann. §99-19-101 (5)(h) as Void For Vagueness.

Petitioner contends that the eighth statutory aggravating circumstance of Miss. Code Ann. §99-19-101, on which his death sentence is partly based, is so vague and standardless that any sentence based thereon is violative of due process. §99-19-101(5)(h) authorizes possible imposition of the death penalty if "[t]he capital offense was especially heinous, atrocious or cruel."[8/]

8/ Gregg v. Georgia, supra, held that a statutory aggravating circumstance authorizing imposition of the death penalty where a murder was "outrageously

> or wantonly vile, horrible, or inhuman in that it involved torture, deprivatity of mind, or an aggravated battery to the victim," was not so imprecise as to render the Georgia capital sentencing procedure arbitrary and capricious in violation of the Eighth Amendment.

428 U.S. at 201, n.51, 49 L.Ed.2d at 890 n.51.

Petitioner contends that this aggravating circumstance is so vague and broad as to amount to no standard at all.

In its decision on plaintiff's appeal, the Mississippi Supreme Court rejected petitioner's vagueness challenge to §99-19-101(5)(h) on the grounds that

> the words "especially heinous, atrocious, or cruel" are not confusing or likely to be misunderstood by the average citizen. The average citizen has a reasonable knowledge of the generally accepted meaning of these words.
>
> . . ..
>
> It is our considered opinion that the average jury in its sound discretion and judgment understands the generally accepted meaning of the words "especially heinous, atrocious or cruel" and is able to apply these words to different factual situations without further definition of these words.

Washington v. State, supra, 361 So.2d at 65. Although the Mississippi court declined to construe the language of §99-19-101(5)(h), it characterized the killing for which petitioner was convicted as "an especially wanton, wilful, useless and cruel killing."[9/] 361 So.2d at 67.

9/ The court summarized the facts of the killing in question:

> The killing was committed during the commission of an armed robbery. Prior to killing Woods, the defendant struck the victim over the head with a long barrel shotgun with much force. The defendant, with a bag full of money, had reached the door and could have easily left without any danger to himself, yet he fired a load of buckshot at close range into the stomach of Woods, causing a massive wound from which there was no chance of recovery.

Washington v. State, supra, 361 So.2d at 67.

In Proffitt v. Florida, supra, an identical statutory aggravating circumstance construed by the Supreme Court of Florida to include only "the conscienceless or pitiless crime which is unnecessarily torturous to the victim," was found not to be so vague and overbroad as to create a "substantial risk that the Florida capital-sentencing system, when viewed in its entirety, will result in the capricious or arbitrary imposition of the death penalty." 428 U.S. at 254 n.11, 49 L.Ed.2d at 924 n.11. Although the vagueness challenge in Proffitt was considered only on Eighth Amendment grounds, id., the Fifth Circuit in Spinkellink v. Wainwright, supra, rejected due process vagueness and overbreath challenges to the Florida statute as construed, 578 F.2d at 610-611. In Spinkellink, the Fifth Circuit found persuasive a ruling by the Florida Supreme Court on a due process challenge to the questioned statutory language.

> The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony. Fla. Stat. §921.141(6)(h), F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremly wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Spinkellink v. Wainwright, supra, 578 F.2d at 611, quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

Although §99-19-101(5)(h) has not been construed as its Florida counterpart to include "the conscienceless or

pitiless crime which is unnecessarily tortous to the victim," the statute on its face is sufficient to convey the meaning that it includes only crimes committed in an unusually shocking, outrageous, despicable, or cruel manner. Some imprecision is inherent in any use of language; however, just as the court in Gregg saw no reason to believe that juries would be unable to understand the statutory aggravating circumstance challenge there,[10/] 428 U.S. at 202 n.54,

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10/ See note 7, supra.

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49 L.Ed.2d at 891 n.54, there is no reason to believe that §99-19-101(5)(h) will not be understood by juries.

6. Due Process Challenge to Alleged Limitation of Mitigating Circumstances by Miss. Code Ann. §99-19-101.

Petitioner contends that §99-19-101 on its face limits the circumstances which may be considered by the jury in mitigation to those enumerated in §99-19-101(6)(a)-(g).[11/]

11/ See n. 3, supra.

Not only is this contention refuted by the express terms of §99-19-101(1),[12/] but the Mississippi Supreme Court in its

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12/ See n. 3, supra.

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decision on plaintiff's appeal held that

> It is crystal clear from our holding in Jackson [v. State of Mississippi, 337 So.2d 1242 (Miss. 1976)] that this Court is committed to the "individualized consideration of mitigating factors" in each case, and that the only limitation placed on the introduction of evidence of mitigating circumstances is that it must be reasonably relevant.

Washington v. State, supra, 361 So.2d at 68.

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D. Eighth Amendment Challenge to Miss. Code Ann. §99-19-105(3)(c).

Miss. Code Ann. §99-19-105(3)(c) provides:

> (3) With regard to the sentence [of death], the court shall determine:
>
> . . . .
>
> (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Petitioner contends that as this statute is applied, the Mississippi Supreme Court compares a death sentence only with other cases where the death penalty was imposed, and that failure of the Mississippi Court in its comparative review to consider cases where capital defendants are found guilty of lesser included offenses or are sentenced to life imprisonment results in arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment. Petitioner's argument is foreclosed by Proffitt v. Florida, supra, where the court held that

> it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency. For example, it has several times compared the circumstances of a case under review with those previous cases in which it is assessed the imposition of death sentences . . . . By following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute. Cf. Gregg v. Georgia, at 204-206, 49 L.Ed.2d 859, 96 S.Ct. 2909.

428 U.S. at 258-59, 49 L.Ed.2d at 926. The Proffitt court then rejected a contention identical to that raised here:

> The petitioner also argues that since the Florida Court does not review sentences of life imprisonment imposed in capital cases or sentences imposed in cases where a capital crime was charged but where the jury convicted of a lesser offense, it will have an

> unbalanced view of the way a typical jury treats a murder case and it will affirm death sentences under certain circumstances where the vast majority of judges would have imposed a sentence of life imprisonment. As we noted in Gregg v. Georgia, ante, at 204, n 56 . . . this problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty.

428 U.S. at 259 n.16, 49 L.Ed.2d at 927 n.16.

E. Alleged Errors by Trial Court.

1. Denial of Due Process by the Trial Court's Permitting Introduction of Evidence and Argument On Issues of Aggravation Not Listed in the Indictment.

This contention obviously is interelated with that discussed in part B.2.j. of this report, supra at p.15, and similarily must be rejected in the absence of any supporting authorities. See Denial Of Application For Stay Of Execution, Spinkellink v. Wainwright, No. A-1016, 47 USLW 3771 (May 22, 1979) (per Rehnquist, Circuit Justice).

2. Eighth Amendment Challenge to Failure to Require "Specific" Written Findings in Accordance With Miss. Code Ann. §99-19-101(3).[13/]

13/ See n.3, supra.

The verdict returned in the sentencing phase of petitioner's trial provided:

> We the jury unanimously find that the aggravating circumstances of one, the capital murder was committed while the defendant Johnny Lewis Washington was engaged in the commission of the crime of robbery; two, the defendant Johnny Lewis Washington committed the capital murder in an especially heinous, atrocious, or cruel manner are sufficient to impose the death penalty. That there are insufficient mitigating circumstances to outweigh the aggravating circumstances. And we unanimously find that the defendant should suffer death.

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Washington v. State, supra, 361 So.2d at 65. The jury thus specifically found that the presence of two statutory aggravating factors, viz., §99-19-101(5)(d) and (h),[14/]

14/ See n.3, supra.

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that such aggravating circumstances were sufficient to impose the death penalty, that the aggravating circumstances outweighed the mitigating circumstances, and that defendant should be sentenced to death. Petitioner cites no authority for the proposition that §99-19-101(3) requires anything more. Furthermore, in discussing sentencing under the Florida death statute,[15/] the Fifth Circuit noted that

> if the court imposes a sentence of death, it must set forth written findings of fact to support its decision. Thus the trial court, in order to impose the death penalty, must find that sufficient statutorily-defined aggravating circumstances exist to justify the death penalty and that there are insufficient statutorily-defined mitigating circumstances to outweigh the aggravating circumstances found to exist.

Spinkellink v. Wainwright, supra, 578 F.2d at 588. (emphasis added).

15/ Compare Fla. Stat. Ann. §921.141(2) and (3), supra n.4, with §99-19-101(3), supra n.3.

F. Due Process Challenge to Instruction C-20.

Petitioner contends that instruction C-20, to which no objection was raised at trial, impermissibly limited the jury's consideration of mitigating circumstances in violation of the Due Process Clause. The specific mitigating circumstances which petitioner contends was excluded from consideration by the jury is the fact, as to which he testified at the presentence hearing, that he had a 3-year-old child[16/]

16/ This fact was included in the argument of petitioner's counsel at the sentencing phase of trial. (R. 318).

by a woman with whom he had been "going with" for approximately five years and with whom he had been living for about two years. (R. 213-13). 17/

17/ In support of this contention, petitioner claims that "[t]he record reflected that the Petitioner had worked and supported a child and the child's mother." First Supplemental Memorandum in Support of Motion for Petition for Writ of Habeas Corpus at 3. The record, however, does not so reflect.

Under Mississippi law, objections to instructions are waived unless raised at trial. E.g., Evans v. State, 315 So.2d 1, 5 (Miss. 1975). Petitioner's failure to object to the instruction at trial accordingly would appear to preclude consideration of this claim by plaintiff for habeas relief, Bradley v. Wainwright, 561 F.2d 1200 (5 Cir. 1977), but assuming arguendo that it does not, the instruction did not deprive petitioner of a fundamentally fair trial.

> Before a federal court may grant relief under 28 U.S.C.A. § 2254 based on an alleged error in a state trial court's unobjected to charge, the error must be so egregious as to rise to the level of a Constitutional violation or so prejudicial as to render the trial itself fundamentally unfair. See Alvarez v. Estelle, 531 F.2d 1319, 1322 (5th Cir. 1976), and cases cited. See also Bradley v. Wainwright, 561 F.2d 1200 (5th Cir. 1977). And, just last term, the Supreme Court observed: "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 1736, 52 L.Ed. 2d 203 (1977) (note omitted).

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Bryan v. Wainwright, 588 F.2d 1108, 1110-11 (5 Cir. 1979). As further noted in Henderson v. Kibbe, supra, "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Id., 431 U.S. at 155, 52 L.Ed.2d at 213.

While instruction C-20 could be more complete, it is not a misstatement of the law. The instruction directed the jury to "consider the detailed circumstances . . . of the defendant himself", admonished the jury to "[c]onsider only" the two relevant statutory aggravating circumstances, and further instructed that if such aggravating circumstances were found, to "consider whether there are mitigating circumstances which outweigh the aggravating circumstances," and specifically to "consider" the two relevant statutory mitigating circumstances. The trial court thus properly instructed the jury in accordance with §99-19-101, albeit not in the clearest terms, by directing the jury that certain statutory aggravating circumstances must be found to permit imposition of the death penalty, but that if such were found, the death penalty nevertheless could not be imposed if pertinent statutory mitigating circumstances were found to outweigh the statutory aggravating circumstances. There is no express language in the instruction which directs the jury to limit its consideration of mitigating circumstances to the two relevant statutory mitigating circumstances. Furthermore, whether exclusion of consideration of particular mitigating circumstances constitutes a due process violation depends upon the facts of the case and the degree of relevancy of the excluded mitigating factors. See Green v. Georgia, _____ U.S. _____, 60 L.Ed.2d 738, 741 (1979). Under the facts of the instant case, any prejudice resulting to petitioner from the lack of clarity of instruction C-20 was not such as to deprive petitioner of a fundamentally fair trial.

III. MOTION FOR DISCOVERY

Petitioner seeks leave to engage in extensive discovery to develope support for several of the claims raised in his petition. Leave to utilize discovery processes in a habeas corpus action will not be granted absent a showing of good cause therefor. Rule 6, Rules Governing Section 2254 Cases.

> [W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore, entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

Harris v. Nelson, 394 U.S. 286, 300, 22 L.Ed.2d 281, 291 (1969). For the reasons set forth above in this report, petitioner has failed to make the required showing for leave to engage in the requested discovery.

IV. CONCLUSION

For the foregoing reasons, petitioner has not stated any proper claims for habeas relief requiring evidentiary hearing. However, "[i]n situations in which an evidentiary hearing is not mandatory, the judge may nonetheless decide that an evidentiary hearing is desirable." Advisory Committee Note to Rule 8, Rules Governing Section 2254 Cases. Because petitioner is under sentence of death, and because effectiveness of counsel depends upon the facts of individual cases, e.g., King v. Beto, 429 F.2d 221, 222 n.1 (5 Cir. 1970), it is recommended that petitioner be provided an evidentiary hearing on his claim of ineffective assistance of counsel to insure that there is no basis in fact to support such claim, and that the remainder of petitioner's claims for habeas relief be denied without evidentiary hearing.

William Edward RIGDON

v.

RUSSELL ANACONDA ALUMINUM COMPANY and Travelers Insurance Company.

No. 51714.

Supreme Court of Mississippi.

Jan. 16, 1980.

Rehearing Denied April 16, 1980.

Appeal from Circuit Court, Lauderdale County; Henry Palmer, Judge.

Laurel G. Weir, Philadelphia, for appellant.

Daniel, Coker, Horton, Bell & Dukes, Roger C. Clapp, Jackson, for appellees.

Before SMITH, P. J., and SUGG and BOWLING, JJ.

AFFIRMED.

Larry JONES

v.

STATE of Mississippi.

No. 50944.

Supreme Court of Mississippi.

Jan. 30, 1980.

Rehearing Denied April 2, 1980.

Defendant was convicted before the Circuit Court, Harrison County, Floyd J. Logan, J., of capital murder and was sentenced to death, and he appealed. The Supreme Court, Patterson, C. J., held, for the Court on the guilt-determining phase, that: (1) evidence sufficiently demonstrated defendant's willing participation in robbery in the furtherance of which death resulted, and, thus, evidence was sufficient to sustain conviction; (2) defendant was not entitled to relief on theory that he was denied fair trial due to fact that jury learned of coparticipant's conviction in separate trial; and (3) refusal to give instruction concerning weight to be accorded testimony of accomplice was not reversible error. The Court further held, in an opinion by Walker, J., on the sentence-determining phase, that: (1) failure to inform jurors that life sentence would be imposed in event of their inability to reach unanimous verdict was not reversible error; (2) certain note was not a statement by jurors that they could not reach unanimity within reasonable time, and thus, trial court was not required to enter life sentence on receiving such note; (3) where remarks made by defendant while arguing his case to jury constituted unsworn testimony there was a partial waiver of constitutional privilege against self-incrimination and prohibition against district attorney commenting on defendant's not taking the stand; (4) defendant's armed robbery conviction, which was entered after the murder, could be considered during sentencing phase of murder case; and (5) death sentence was not excessive and disproportionate to penalty imposed in similar cases.

Affirmed.

Patterson, C. J., dissented in regard to sentence-determining phase and filed opinion in which Smith, P. J., and Broom and Cofer, JJ., joined.

1. Witnesses ⇐46

Admitted perjurer was presumptively innocent of perjury when she testified in criminal proceeding, and, thus, was a competent witness.

2. Criminal Law ⇐742(1)

In criminal proceeding in which there were exhaustive attempts by the defense to impeach certain witnesses and by the State to rehabilitate them, permitting jury to determine weight and worth to be accorded to such witnesses' testimony was proper.

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3. Criminal Law ⇐507(1), 508(1)

Confessed accessory after the act to the murder with which defendant was charged was an "accomplice"; his status as an accomplice affected the weight, but not the competency of his testimony.

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐510

Accused may be convicted on uncorroborated testimony of an accomplice.

5. Criminal Law ⇐508(9)

In proceeding in which defendant was convicted of capital murder, inconsistency between accomplice's testimony concerning color of pants worn by defendant on day of the homicide and accomplice's testimony on the same matter at previous hearing and inconsistency in regard to fact that accomplice had timely told police that certain person was with participants on the day of the homicide but that the evidence was inconclusive as to whether such person did accompany the participants did not destroy accomplice's testimony as a matter of law.

6. Criminal Law ⇐742(1)

Jury has duty to determine impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity.

7. Homicide ⇐29

In proceeding in which defendant was convicted of capital murder, it need not be shown that defendant, as one of two cofelons, had acted as the efficient cause of the death, but, rather, it was enough that the evidence showed defendant's willing participation in a robbery in furtherance of which a death resulted. Code 1972, §§ 97-1-3, 97-3-19(2)(e).

8. Homicide ⇐234(5)

Evidence sufficiently demonstrated defendant's willing participation in a robbery in furtherance of which a death resulted, and, thus, the evidence was sufficient to sustain defendant's conviction of capital murder. Code 1972, §§ 97-1-3, 97-3-19(2)(e).

9. Criminal Law ⇐1152(2)
Jury ⇐131(2)

Trial court's broad discretion in passing on extent and propriety questions addressed to prospective jurors is not unlimited, and an abuse will be found on appeal where clear prejudice to the accused results from undue constraint on the defense or undue lack of constraint on the prosecution.

10. Criminal Law ⇐655(4)

In proceeding in which defendant was convicted of capital murder, undue restraint was not imposed on defense counsel when such counsel, who attempted to ask prospective jurors whether they would consider indictment as anything but a "mere piece of paper" in considering their verdict, was advised by the court that it would instruct on such point.

11. Criminal Law ⇐725

In proceeding in which defendant was convicted of capital murder and was sentenced to death, sustaining objection to defense counsel's attempt, during closing summation in guilt-determining phase of case, to place individual jurors in nonneutral position of the accused was proper.

12. Criminal Law ⇐713

In criminal proceeding, sustaining objection to defense counsel's statement "[b]ear with me also because the state is going to try to confuse me as much as they can" was proper.

13. Criminal Law ⇐719(1)

Sustaining objection to defense counsel's suggestion to jury that one of State's witnesses had been granted immunity from perjury was proper in criminal proceeding in view of absence of any indication in the record that there had been a grant of immunity.

14. Criminal Law ⇐719(1)

Counsel must limit his remarks in his closing argument to the evidence presented.

15. Criminal Law ⇐730(3)

Defendant, who was convicted of capital murder and was sentenced to death, was not entitled to relief on appeal due to ad-

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mission of testimony and statements touching on unpleasant details of victim's death, in light of fact that trial court sustained objections to any details relating to physical aspects of the death when questioning exceeded that necessary to establish the fact and cause of death.

16. Criminal Law ⇐1137(2)

Defendant, who was convicted of capital murder and was sentenced to death, was not entitled to relief on appeal on theory that he was denied fair trial due to fact that jury had learned of a coparticipant's conviction in a separate trial, in light of fact that defense counsel had underscored such conviction and had attempted to use that fact to defendant's advantage.

17. Criminal Law ⇐730(1)

In proceeding in which defendant was convicted of capital murder, sustaining defense counsel's objection to the remark "then finding this Defendant along with the co-defendant * * * four days later and this Defendant doing" was sufficient to repair any prejudice which might otherwise have resulted; it negated any suggestion of guilt by association.

18. Criminal Law ⇐829(1)

In proceeding in which defendant was convicted of capital murder, refusal to give certain instructions was not error, in light of fact that such instructions were, in all essential respects, cumulative with others which were granted and that jury was properly instructed on law of the case.

19. Criminal Law ⇐806(1)

Trial court is not required to grant several instructions on same question in different verbiage.

20. Criminal Law ⇐780(1)

Though it is not improper to grant an instruction on weight to be accorded to testimony of an accomplice, whether to grant or refuse such an instruction rests within sound discretion of trial court.

21. Criminal Law ⇐1173.2(6)

In proceeding in which defendant was convicted of capital murder, refusal to give instruction concerning weight to be accorded testimony of an accomplice was not reversible error, particularly in light of fact that the instruction suggested that testimony of the accomplice was unsupported by other evidence when in fact it was corroborated.

On Sentencing Phase of Trial

22. Jury ⇐108

In proceeding in which defendant was convicted of capital murder and was sentenced to death, trial court acted properly in eliminating for cause those jurors, who indicated that their conscientious scruples against death penalty would prevent them from trying the issue of guilt in accord with their oath, and in retaining the prospective jurors who harbored conscientious scruples but signified that they could follow law and fairly try the case.

23. Criminal Law ⇐13.1(2)

Death penalty statute is not unconstitutionally vague. Code 1972, § 99-19-101.

24. Criminal Law ⇐1173.2(4)

In proceeding in which defendant was convicted of capital murder and was sentenced to death, failure, during sentencing phase of trial, to inform jurors that life sentence would be imposed if jurors were unable to reach a unanimous verdict was not reversible error, in view of fact that jury reached unanimous verdict within reasonable time. Uniform Criminal Rules of Circuit Court Practice, rule 5.13.

25. Homicide ⇐354

In proceeding in which defendant was convicted of capital murder and was sentenced to death, note, which was written after jury had deliberated for two hours and fifteen minutes and which stated that "[w]e the jury cannot come to the unanimously [sic] decision—what shall we do," was not a statement by jurors that they could not reach unanimity within a reasonable time, but, rather, was a statement to effect that jurors were weary and desired a recess, and, thus, it was not required that trial court enter a life sentence after receiving the note. Uniform Criminal Rules of Circuit Court Practice, rule 5.13.

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26. Criminal Law ⇐701

State constitutional provision guarantees accused the right to argue his case to jury. Const.1890, § 26.

27. Witnesses ⇐300

Accused has right not to testify. U.S.C.A.Const. Amend. 5.

28. Criminal Law ⇐721(1)

Prosecutorial comment on an accused's failure to testify is a violation of right against self-incrimination clause of Fifth Amendment. U.S.C.A.Const. Amend. 5.

29. Criminal Law ⇐719(1)

If accused chooses to argue his case to jury and at the same time invokes Fifth Amendment, he must confine his remarks to the evidence in the record. Const.1890, § 26; U.S.C.A.Const. Amend. 5.

30. Criminal Law ⇐721(1)

Accused who takes advantage of his right to argue his case to jury must not be permitted to say all the things which he might have testified to had he chosen to call himself as a witness; if he does so, he will be deemed to have waived right not to have his failure to take the stand commented on. Const.1890, § 26; U.S.C.A.Const. Amend. 5.

31. Constitutional Law ⇐43(1)

Individual may waive personal protection privileges provided by Federal Constitution.

32. Criminal Law ⇐719(1)

Accused waives immunity from self-incrimination when he goes beyond the record when arguing his case and gives testimony on a material point which is not in the record. Const.1890, § 26; U.S.C.A.Const. Amend. 5.

33. Criminal Law ⇐641.4(1, 5)

If accused uses his constitutional right to argue his case to jury for purpose of giving testimony, he partially waives privilege against self-incrimination to extent of limiting prosecution to comment to the jury that defendant's statements were not given under oath and that he was not subject to cross-examination about them; constitutional privilege of criminal defendant appearing pro se is adequately protected if court gives him a clear and direct warning out of the presence of jury prior to beginning his argument that such limited comment might follow if he goes outside the record and gives unsworn testimony. Const.1890, § 26; U.S.C.A.Const. Amend. 5.

34. Criminal Law ⇐641.4(5)

State Constitution gives accused right to be heard by himself or counsel, or both, but it does not exempt a defendant who argues pro se from following the rules of court procedure. Const.1890, § 26.

35. Criminal Law ⇐641.4(5)

Trial court should allow to a defendant, who argues pro se, some leeway in arguing his case. Const.1890, § 26.

36. Criminal Law ⇐721(1)

Where remarks made by accused while arguing his case to jury constituted unsworn testimony, there was a partial waiver of constitutional privilege against self-incrimination and the prohibition against the district attorney commenting on accused's failure to take the stand. Const.1890, § 26; U.S.C.A.Const. Amend. 5.

37. Criminal Law ⇐730(7)

In proceeding in which defendant was convicted of capital murder and was sentenced to death and in which the evidence showed that victim had been struck with blunt instrument, fact that district attorney referred to such instrument as a wrench in closing argument during sentencing phase of case was not prejudicial, in light of fact that jury was properly instructed to consider only the evidence in the record and that objection to district attorney's statement was sustained.

38. Homicide ⇐354

Word "previously," within statute providing that fact that defendant was previously convicted of another capital offense or of a felony involving use or threat of violence to the person was an aggravating circumstance available for consideration in capital cases, relates to the time of trial, and, thus, defendant's armed robbery con-

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viction, which was entered after he committed murder, could be considered during sentencing phase of the murder case. Code 1972, § 99-19-101(5)(b).

See publication Words and Phrases for other judicial constructions and definitions.

39. Homicide ⇐354

On appeal from defendant's conviction of capital murder and sentence to death, the sentence was not shown to have been imposed under influence of passion or prejudice. Code 1972, § 99-19-105(3)(a).

40. Homicide ⇐354

In proceeding in which defendant was convicted of capital murder and was sentenced to death, evidence supported jury's finding that there were aggravating circumstances consisting of fact that the offense was committed during commission of robbery, that the offense was especially heinous, atrocious or cruel and that defendant had been previously convicted of a felony involving use or threat of violence to the person. Code 1972, §§ 99-19-101(3)(b), (5)(b).

41. Criminal Law ⇐1206(2)
Homicide ⇐354

Sentence of death for specially heinous, atrocious or cruel capital murder committed by defendant, who was only 17 or 18 years of age at time of the offense, who was not shown to have struck the blows causing the death, but who was willing participant in the robbery resulting in the death and had been previously convicted of a felony involving use or threat of violence to the person, was not excessive and disproportionate to penalty imposed in similar cases. Code 1972, § 99-19-105(3)(c).

Morris & Walton, Charles E. Morris, Jr., C. Wesley Walton, Biloxi, for appellant.

A. F. Summer, Atty. Gen. by Calvin Coolidge Williams, Jr., Sp. Asst. Atty. Gen., Jackson, for appellee.

En Banc.

PATTERSON, Chief Justice, for the Court on the Guilt-Determining Phase.

WALKER, Justice, for the Court on the Sentence-Determining Phase.

Larry Jones appeals from a second conviction of capital murder and sentence of death entered in the Circuit Court of the Second Judicial District of Harrison County.

We reversed Jones' first conviction and death sentence in *Jones v. State*, 342 So.2d 735 (Miss.1977), and directed a new trial following *Jackson v. State*, 337 So.2d 1242 (Miss.1976).

THE GUILT PHASE OF TRIAL

The state's case centers upon the testimony of J. D. Reddix, hereinafter J. D., who testified that on the morning of December 2, 1974, his brother Willie Reddix, hereinafter Willie, and Larry Jones persuaded him to drive them to downtown Biloxi. J. D. testified that at the time he had no knowledge of any criminal design of the others. After stopping for gas, J. D. proceeded with Willie and Larry Jones, hereinafter Jones, to downtown Biloxi where he parked his gray Cadillac in the parking lot of a shoe store. J. D. testified Willie and Jones then left walking in the general direction of Weinburger's store while he remained in the car. J. D. recalled that Jones at the time was wearing a pair of combat boots.

Orvel McGee was in the same downtown area on December 2, 1974. After identifying a photograph of J. D.'s car, he testified that at about 11:15 a. m. he saw one man park the car and two others get out of it and walk in the direction of Weinburger's store. McGee observed that one of the persons leaving the car wore combat boots. Shortly thereafter, he saw them return and noted the person wearing combat boots was carrying a footlocker. He could not identify Jones as one of the two men he saw leave and later return to the car.

Shortly before noon on December 2, 1974, Ray Real, a store manager, observed a man carrying a footlocker away from Weinbur-

ger's store. At about this time Preston Sullivan testified he entered the store and found Arthur Weinburger, proprietor, lying in an office doorway amid a pool of blood. A surgeon gave evidence that Weinburger died later in the day as the result of blows to his head.

J. D. stated that Jones was carrying a footlocker when he returned to the car. A state witness, Lula Mae Bell, aunt of J. D. and Willie, at first testified she could not remember having seen her nephews or Jones in downtown Biloxi on the day of the homicide. However, on direct examination the following day she recanted, admitting that she had "lied" earlier in her testimony, and explained by stating her life had been threatened in the interest of Jones. She then testified that she did see Willie and Jones leave J. D.'s car and walk toward Weinburger's store on the day of the homicide and that Jones was wearing combat boots.

Annie Lee Reddix, mother of Willie and J. D., testified that on December 2, 1974, J. D., Willie and Jones left her house in J. D.'s car. When they returned, Jones stored the footlocker which he had in her house, changed the combat boots he was wearing to tennis shoes, and later departed, leaving the boots.

On December 3, 1974, pursuant to warrant, detectives searched the house of Annie Lee Reddix. They discovered a footlocker and a pair of combat boots. The footlocker was identified as the one taken from Weinburger's store, and the boots were found to be stained with human blood of an undeterminable type. Lerline Blancq, manager of Weinburger's store, testified that approximately $600 had been taken in the robbery and positively identified the merchandise found in the footlocker as belonging to Weinburger's store.

By his first, second, and sixth assignments of error, Jones raises the sufficiency of the evidence to support the jury's guilty verdict. He argues that only two witnesses, Lula Mae Bell, an admitted perjurer, and J. D. Reddix, an admitted accomplice, linked him to the crime.

We conclude the state presented circumstantial evidence sufficient to support the jury verdict of guilty. Under our authorities Lula Mae Bell's and J. D. Reddix's testimony is competent.

[1, 2] Lula Mae Bell was presumptively innocent of perjury when she testified and was therefore a competent witness. *Isonhood v. State*, 274 So.2d 685, 690 (Miss. 1973). As for J. D. Reddix, his status as an accomplice affected the weight, not the competency of his testimony. *Thomas v. State*, 340 So.2d 1 (Miss.1976); *Black v. State*, 336 So.2d 1302 (Miss.1976); *Fleming v. State*, 319 So.2d 223 (Miss.1975). The jury had before it exhaustive attempts by the defense to impeach these witnesses and by the state to rehabilitate them. The trial court, in our opinion, properly left to the jury the weight and worth to be accorded their testimony. From the entirety of the record and particularly in view of the corroborating circumstances evidenced by disinterested witnesses, we think that reasonable minds could have found it to have been beyond reasonable doubt that Jones participated in the robbery resulting in Weinburger's death.

[3, 4] As a confessed accessory after the fact to the murder with which Jones was charged, J. D. was an accomplice. *Dedeaux v. State*, 125 Miss. 326, 87 So. 664 (1921). Therefore, his testimony must be considered with caution. *Feranda v. State*, 267 So.2d 305 (Miss.1972). However, it is also established that an accused may be convicted on the uncorroborated testimony of an accomplice. *Rich v. State*, 322 So.2d 468 (Miss. 1975); *Moore v. State*, 291 So.2d 187 (Miss. 1974); *Young v. State*, 212 Miss. 460, 54 So.2d 671 (1951). Moreover, J. D.'s testimony appears consistent with the corroborating testimony to which other witnesses testified.

State witnesses Orvel McGee, Ray Real, Preston Sullivan, Lerline Blancq, and others, together established that at about midday on the day of the homicide, two empty-handed black men, one wearing combat boots, went in the direction of Weinburger's

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store from J. D.'s parked automobile. Orvel McGee recalled seeing a man wearing combat boots return with a footlocker to the car a few minutes after he left it. Later a footlocker was carried by Jones into Annie Lee Reddix's house, where it was subsequently discovered and identified as stolen from Weinburger's store, and blood-stained boots were also found. In sum, the record contains more than "slight" corroborative evidence which we held sufficient to sustain the conviction on an accomplice's testimony in *Lifer v. State*, 189 Miss. 754, 199 So. 107 (1940), and cases cited therein.

On cross-examination of J. D., an inconsistency was established between his current testimony concerning the color of the pants worn by Jones on the day of the homicide and his testimony on the same matter given at a previous hearing. J. D. acknowledged the inconsistency, but offered no explanation. An additional inconsistency was brought out on cross-examination. J. D. had apparently told the Biloxi police that one "Royce" was with them on the day of the homicide, but the evidence was inconclusive as to whether "Royce" or "Roy,"[1] as he was later referred to, accompanied the participants in the crime to the downtown area.

[5, 6] We do not think the cross-examination concerning the color of the pants worn by Larry Jones and the company of Roy destroyed J. D.'s testimony as a matter of law. The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity. The entire sequence of examination suggests that while Roy may have been "with them" sometime on December 2, 1974, he did not accompany the criminal participants to downtown Biloxi. Under the circumstances, we think leaving the question of credibility to the jury was proper and that appellant's conviction cannot be said to be contrary to the weight of the evidence. *See Kinney v. State*, 336 So.2d 493 (Miss.1976); *Black v. State*, 336 So.2d 1302 (Miss.1976); *Fleming v. State*, 319 So.2d 223 (Miss.1975); *Null v. State*, 311 So.2d 654 (Miss.1975).

[7] Appellant next contends, "The record does not expressly show that this appellant was actively engaged in an assault on the victim in the course of the robbery set out by all the evidence in the record." We agree the record does not conclusively establish which of the two co-felons, Willie Reddix or Larry Jones, the appellant, actually wielded the blows causing Weinburger's death. However, doubt concerning the precise role of the appellant in the homicide does not upset the jury's verdict. The indictment alleges that Larry Jones, together with his co-indictees Willie Reddix and J. D. Reddix, participated in an armed robbery which resulted in the death of Arthur Weinburger, a human being. The statutory subsection proscribing appellant's conduct, Mississippi Code Annotated section 97-3-19(2)(e) (1972), appears in the indictment. It designates as capital murder a killing "done *with or without any design to effect death*, by any person engaged in the commission of the crime of . . . robbery . . . ."

This language renders the factual question of which of two co-felons acted as the efficient cause of the death unnecessary to the verdict in the guilt-determining phase. It is enough that the evidence shows the willing participation of the accused in a robbery in furtherance of which a death resulted. *See Price v. State*, 362 So.2d 204 (Miss.1978); *McNeer v. State*, 228 Miss. 308, 87 So.2d 568 (1956); *Carrol v. State*, 183 Miss. 1, 183 So. 703 (1938); *Woodward v. State*, 166 Miss. 596, 143 So. 859 (1932); *Fisher v. State*, 150 Miss. 206, 116 So. 746 (1928); cf. Miss.Code Ann. § 97-1-3 (1972).

[8] As we have said, the evidence sufficiently demonstrates such a willing participation by the appellant. He does not challenge the indictment, nor suggest the legislature lacks the power to expose him to guilt of capital murder in the absence of proof that he had a specific intention to kill. We conclude that the verdict in the guilt-determining phase is within the law and the weight of the evidence.

1. Again referred to in the sentencing phase by Jones in his pro se argument.

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Appellant next contends the cumulative effect of trial errors consisting of unduly constrained *voir dire* examination, unduly restricted defense argument and improper prosecutorial remarks requires reversal.

[9] The trial court has broad discretion in passing upon the extent and propriety of questions addressed to prospective jurors. *Myers v. State*, 268 So.2d 353 (Miss.1972). Although broad, the discretion is not unlimited, and an abuse will be found on appeal where clear prejudice to the accused results from undue constraint on the defense or undue lack of constraint on the prosecution. *See, e. g., McCaskill v. State*, 227 So.2d 847 (Miss.1969); *Leverett v. State*, 112 Miss. 394, 73 So. 273 (1916).

Appellant complains that the trial court did not permit him to inquire of the prospective jurors whether they would be happy to be tried by persons in their frame of mind. Yet our review reveals the trial court, for whatever reason, did permit this questioning. Further, appellant suggests he was not permitted to ask the prospective jurors whether they would follow the law. Again, the record does not support the suggestion, and we must conclude neither contention has merit.

[10] Appellant next argues that undue restraint was imposed upon defense counsel when he attempted to ask the prospective jurors whether they would consider the indictment as anything but a "mere piece of paper" in considering their verdict. At this point the court advised defense counsel that he would instruct on this point and the record reveals that he did so at the appropriate time.

[11] A review of the objections which were sustained to defense counsel's closing summation in the guilt-determining phase reveals no error, in our opinion. The court properly sustained an objection to defense counsel's attempt to place the individual jurors in the non-neutral position of the accused. *See Danner v. Mid-State Paving Co.*, 252 Miss. 776, 173 So.2d 608 (1965).

[12-14] The state also objected to defense counsel's statement, "[b]ear with me also because the state is going to try to confuse me as much as they can . . . ." The court sustained the objection to this argument and we think properly so. Later in defense counsel's argument, the court sustained an objection raised when counsel suggested to the jury that one of the state's witnesses had been granted immunity from perjury. Again, the trial court's ruling appears to have been correct, because there is no suggestion in the record that there had been a grant of immunity. One well established constraint upon the permissible perimeters of closing argument is that counsel must limit his remarks to the evidence presented: *See Gray v. State*, 351 So.2d 1342 (Miss.1977); *Nelms and Blum v. Fink*, 159 Miss. 372, 131 So. 817 (1930).

[15] Appellant next contends that the cumulative effect of objectionable statements made by the state vitiated his trial with prejudicial error. Appellant's complaint concerns testimony and statements which touched upon the unpleasant details of Weinburger's death. Again, reviewing the record, we find the trial court sustained defense counsel's objections to any detail relating to the physical aspects of the death when questioning exceeded that necessary to establish the fact and cause of death. For example, the trial court refused to admit pictures of the deceased during the guilt phase and instructed the jury to disregard the state's dim suggestions that the killing was particularly atrocious.

[16] Appellant also complains that the jury learned of Willie Reddix's conviction in a separate trial. It is true that we have held admission of evidence of this nature to be inimical to a fair trial. *Ivy v. State*, 301 So.2d 292 (Miss.1974); *McCray v. State*, 293 So.2d 807 (Miss.1974); *Buckley v. State*, 223 So.2d 524 (Miss.1969); *State v. Thornhill*, 251 Miss. 718, 171 So.2d 308 (1965). However, we find that defense counsel underscored Willie Reddix's conviction and attempted to use that fact to appellant's advantage, as can be seen from the following colloquy between defense counsel and state witness Annie Lee Reddix:

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Q. You do have a real good motive in shifting the blame in this case from your son J. D. to Larry Jones haven't you?

• • • • • •

A. I don't know the reason you are talking about.

Q. Well, J. D. is your son, isn't he?

A. Yes, he's my son.

Q. J. D. was charged with capital murder, wasn't he?

A. All three of them was charged with capital murder.

Q. That's right, and Willie's been convicted hasn't he?

A. Yes.

Q. And sent to the gas chamber.

A. Yes.

Also, defense counsel while cross-examining J. D. Reddix, elicited the following testimony:

Q. Were you or were you not a codefendant in this case in the beginning?

A. Would you—what—

Q. —Weren't you charged and indicted for the crime of capital murder?

A. Yes, I was.

We think an appellant cannot assail as prejudical his own trial tactics, because it would foster a propensity in litigants to create error to enhance the possibility of reversal and repeated trials. This he is not permitted to do. *Simpson v. State*, 366 So.2d 1085 (Miss.1979).

[17] Appellant then argues his motion for a mistrial was improperly denied, because irreparable prejudice resulted from the following:

BY MR. NECAISE: And then finding this Defendant along with the co-defendant, Willie Reddix, in Jackson County four days later and this Defendant doing—

BY MR. MORRIS: —objection, Your Honor. There is no evidence whatsoever before this Court that this Defendant was found with Willie Reddix.

BY THE COURT: Objection sustained.

The court's ruling sufficed to repair any prejudice which might otherwise have resulted. It negated, we think, any suggestion of guilt by association.

In conclusion, we are of the opinion that when considered either alone or in combination, appellant's third, fourth, and twelfth assignments of error do not merit reversal of the verdict rendered in the guilt-determining phase.

[18, 19] By his seventh assignment of error, Jones contends the court erred in refusing Instructions D–4, D–5, D–8, D–9, D–10, D–12, D–16, D–17, D–18 and D–19. We have studiously reviewed these instructions and are of the opinion they are in all essential respects cumulative with others which were granted. The trial court is not required to grant several instructions on the same question in a different verbiage. *McMillan v. State*, 198 Miss. 179, 21 So.2d 586 (1945). When we consider all of the instructions together, we conclude the jury was properly instructed upon the law of the case.

[20, 21] Instruction D–17 concerns the weight to be accorded the testimony of an accomplice. While it would not be improper to grant an instruction of this nature, *Dedeaux v. State*, 125 Miss. 326, 87 So. 664 (1921), the decision to grant or refuse it rests within the sound discretion of the trial court. *Ragan v. State*, 318 So.2d 879 (Miss. 1975); *Wellborn v. State*, 140 Miss. 640, 105 So. 769 (1925). Moreover, the instruction refers to "the unsupported testimony of an alleged codefendant." This suggests the testimony of the accomplice was unsupported by other evidence when in fact it was corroborated. We therefore think refusal of Instruction D–17 does not constitute reversible error.

Our review of the record reveals no prejudicial error. We therefore affirm the verdict of guilty.

AFFIRMED.

All Justices concur.

THE SENTENCING PHASE OF TRIAL

WALKER, Justice, for the Court.

[22] The appellant contends there was error in dismissing jurors who were opposed •

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to the death penalty. The relevant portions of the voir dire examination lead us to conclude this assignment has no merit.

On appellant's appeal from his first conviction of capital murder, this Court in directing a retrial in accord with *Jackson, supra*, stated: "On retrial, if defendant is tried on a capital charge, the trial court will follow *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)." 342 So.2d at 737. The lower court complied with this directive by eliminating for cause those jurors who not only indicated they harbored conscientious scruples against the death penalty, but who also indicated those scruples would prevent them from trying the issue of guilt in accord with their oath. Those who harbored conscientious scruples but who signified they could follow the law and fairly try the case were retained as prospective jurors. This complied with *Witherspoon, supra*. *See also Spinkellink v. Wainwright*, 578 F.2d 582, 592–93 (5th Cir. 1978).

[23] Appellant next contends the death penalty statute, Mississippi Code Annotated section 99-19-101 (Supp.1978), is unconstitutionally vague. He argues that no valid death penalty statute existed in this state at the time of the crime charged. We have rejected identical contentions in earlier opinions and think it unnecessary to reiterate the discussions contained in them. *See Washington v. State*, 361 So.2d 61 (Miss. 1978); *Irving v. State*, 361 So.2d 1360 (Miss. 1978); *Bell v. State*, 353 So.2d 1141 (Miss. 1977); and *Jackson v. State*, 337 So.2d 1242 (Miss.1976).

[24] Jones next argues there was error in Instruction C–30 concerning the form of the verdict. The alleged defect in the instruction consists of the omission of a statement informing the jurors in the event of their inability to reach a unanimous verdict a life sentence would be imposed. We note that Rule 5.13 of the Mississippi Uniform Criminal Rules of Circuit Court Practice provides for such a statement in the sentencing phase of a capital case; however, the omission has not been held reversible error. We have held only that "[i]f the jury is unable to agree unanimously on a verdict at the sentencing hearing, the defendant shall be sentenced to life in prison." *Jackson v. State*, 337 So.2d 1242, 1256 (Miss. 1976).

We do not find an instruction requested by appellant concerning the form of the verdict. But assuming, arguendo, that appellant preserved for review the issue raised by his eighth assignment of error, *see McMullen v. State*, 291 So.2d 537 (Miss. 1974), we are of the opinion that the omission does not constitute reversible error, because the jury did reach a unanimous verdict within a reasonable time.

[25] This brings us to the argument that a life sentence should have been entered when the jury after deliberating for two hours and fifteen minutes, returned to the courtroom at 9:15 p. m. with a note, signed by the foreman, reading, "[w]e the jury cannot come to a unanimously [sic] decision—what shall we do?" The construction of this note becomes, as appellant suggests, crucial under *Jackson, supra*. If interpreted as a statement by the jurors that they could not within a reasonable time reach unanimity, the death sentence imposed the following day is in jeopardy. If, however, it is construed as a statement by the jurors that they were weary and desired a recess, the death sentence eventually imposed is valid, subject only to judicial review pursuant to Mississippi Code Annotated section 99-19-105 (Supp.1978).

When the note was received the trial judge stated: "Ladies and gentlemen of the jury, it's been a long day. You started work this morning at about nine and it's getting a little bit late into the night so at this time, court is going to recess until nine tomorrow morning." In so stating, he complied with this Court's decisions concerning the procedure to be followed when the jury indicates its present inability to reach a unanimous verdict. *See, e. g., Jordan v. State*, 365 So.2d 1198, 1206 (Miss.1978), and cases cited therein. We do not consider the note to be the equivalent of a verdict and therefore conclude this assignment lacks merit.

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Some of the Justices have expressed concern about remarks made by the prosecuting attorney during final arguments in the sentencing phase. These remarks were in response to statements, not supported by the record, made by the defendant while exercising his right to argue his case to the jury, and the district attorney's remarks alluded to the failure of the defendant to testify.

FOR CLARITY, SEE THE PARTS OF THE RECORD DEALING WITH THESE REMARKS ATTACHED HERETO AS APPENDIX "A."

We do not find any prejudicial error stemming from the prosecutor's remarks. The remarks were prompted by the defendant's own statements which were exculpatory and self-serving in nature, not under oath and not supported by the record.

[26-28] Mississippi Constitution, Article 3, Section 26 (1890) guarantees the accused the right to argue his case to the jury. *Gray v. State*, 351 So.2d 1342 (Miss.1977). In addition, the accused in a criminal trial has the right not to testify. That right is so basic to the American concept of a fair trial that a prosecutorial comment on an accused's failure to testify is a violation of the self-incrimination clause of the Fifth Amendment. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

[29, 30] These two rights create a conflict which requires a defendant to make a choice. If he chooses to argue his case to the jury and at the same time invokes the Fifth Amendment, he must confine his remarks to the evidence in the record. The Fifth Amendment privilege against self-incrimination is a shield, not a sword. A criminal defendant who takes advantage of his right to argue his case to the jury must not be permitted to say all the things he might have testified to had he chosen to call himself as a witness. When he does so, he will be deemed to have waived the right not to have his failure to take the stand commented upon.

[31] There is no doubt that an individual may waive the personal protections and privileges provided by the United States Constitution. *Morgan v. United States Fidelity & Guaranty Co.*, 222 So.2d 820 (Miss. 1969). *See also Brewer v. State*, 233 So.2d 779 (Miss.1970) [right of confrontation]; *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357 (1937) [Sixth Amendment]; *Zap v. United States*, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946) [Fourth and Fifth Amendments].

[32] This Court has specifically recognized that an accused can waive his immunity from self-incrimination, and that he does so when he takes the stand and testifies on the merits of the case. *See Autry v. State*, 230 Miss. 421, 92 So.2d 856 (1957). We are of the opinion that he does the same when he goes beyond the record when arguing his case and gives testimony on a material point which is not in the record.

[33] The practical solution to the dilemma presented by the accused who uses his constitutional right to argue his case to the jury to give, what is for all practical purposes, testimony is to treat the unsworn testimonial statements of the accused which were not supported by the record as a partial waiver of the privilege against self-incrimination. It is not a total waiver of the privilege, since the prosecution is unable to cross-examine the accused at this late stage of the trial. But the prosecution may comment to the jury that the defendant's statements were not given under oath and that he was not subject to cross-examination about them. The constitutional privilege of the criminal defendant appearing *pro se* is adequately protected if the court gives him a clear and direct warning out of the presence of the jury prior to beginning his argument that such limited comment might follow if he goes outside the record and gives what amounts to unsworn testimony.

[34, 35] The Mississippi Constitution gives the accused the right to be heard by himself or counsel, or both. However, it does not exempt a defendant who argues *pro se* from following the rules of court procedure. We do note, however, that the trial court should allow him some leeway in

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arguing his case, each case necessarily resting on its own facts and circumstances.

[36] But, in those instances where a defendant, arguing *pro se*, clearly goes beyond the evidence in the record on a material point, as he did in this case, he must accept as a consequence the prosecution's comment on his failure to swear to the testimony. The defendant's remarks in this case cannot be dismissed as a failure to grasp "legal niceties." They are unsworn testimony, and as such, constitute a partial waiver of the constitutional privilege against self-incrimination and the prohibition against a district attorney from commenting on his not taking the stand.

We do not say that every defendant who argues *pro se* loses the privilege against prosecutorial comment on his failure to testify. Only when the defendant's remarks go beyond the evidence does he waive this privilege.

[37] The appellant also contends the following statement by the district attorney in his closing argument constituted prejudicial error:

> To come up behind an old man in the twilight years of life and hit him four times, as he told you, with a wrench. We finally found out what it was—with a wrench. That's what he told you when he got up here.

Even though an objection to this statement was sustained, the appellant contends that its effect was not erased from the minds of the jurors. Assuming this is true, we are not convinced the statement was prejudicial. The facts showed that the decedent was struck with a blunt instrument. We see no prejudice resulting from naming the instrument for what it was, be it a wrench or an iron pipe. The fact remains that decedent's death resulted from the blow. The jury was properly instructed to consider only the evidence in the record, and we cannot agree that any prejudice resulted since the objection to the statement was sustained.

[38] Another problem which deserves comment arose in the sentencing phase. The lower court admitted evidence of an armed robbery conviction of the appellant entered after the December 2, 1974, murder of Weinburger. This conviction was affirmed on appeal in a per curiam opinion. *Jones v. State*, 340 So.2d 17 (Miss.1976).

Among the aggravating circumstances available for consideration in capital cases under Mississippi Code Annotated section 99-19-101 (Supp.1979), subsection (5)(b) is that: "The defendant was *previously* convicted of another capital offense or of a felony involving the use or threat of violence to the person." (Emphasis added). In employing the word "previously," the statute designates no time frame. The question arises as to whether the legislature meant previous to the commission of the capital offense or previous to the trial for it.

We conclude the legislature intended to relate the word "previously" to the time of trial, so that a conviction between the time the capital offense was committed and the time of trial for it may be admitted into evidence as an aggravating circumstance. We think this, because a wide leeway is permitted the appellant to offer mitigating circumstances in avoidance of the death sentence, while an extremely limited type of behavior may be offered by the state in seeking capital punishment. In our opinion, the legislature undoubtedly intended a weighing of both at the time of sentencing so the past behavioral patterns likely to affect the defendant's future behavior might be evaluated by the jury in deciding whether the defendant will live or die. We think there is no more justification for terminating consideration of the defendant's criminal behavior at the time of the offense than there is for terminating consideration of favorable behavior at that time. All go to the question of whether the most severe punishment will serve a legitimate social purpose untainted by vindictiveness.

The aggravating circumstances introduced into evidence and appearing in the jury's verdict are:

> (1) The offense was committed during the commission of robbery.

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(2) The offense was especially heinous, atrocious or cruel.

(3) Defendant has been previously convicted of a felony involving the use or threat of violence to the person.

The first was established by the first phase of trial which culminated in a guilty verdict. The second was proved by pictures illustrating the atrociousness of the killing, together with testimony showing the victim to have been old and weak in comparison with appellant. The third was established by the introduction of court records concerning the prior armed robbery conviction.

The defendant introduced no evidence of mitigating circumstances at the sentencing phase. However, there is evidence that the defendant's age was either seventeen or eighteen years at the time of the crime. Also, a mitigating circumstance mandated by Mississippi Code Annotated section 99-19-101(6)(d), relates to the role of the defendant in the crime. In this regard, there was no testimony indicating that this defendant was the one who struck the blows causing death even though blood was found on his boots. The jury was obviously aware of these circumstances and was instructed to consider any facts concerning the crime or the defendant's background which would reasonably mitigate against imposition of the death penalty. The jury nevertheless found unanimously from the evidence beyond a reasonable doubt that after weighing the mitigating circumstances and the aggravating circumstances, one against the other, the mitigating circumstances did not outweigh the aggravating circumstances, and the defendant should suffer the penalty of death.

[39] Mississippi Code Annotated section 99-19-105 (Supp.1979), in pertinent part, mandates the following:

* * * * * *

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

* * * * * *

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

In response to subsection (3)(a), the Court is of the opinion that the sentence of death was not imposed under the influence of passion or prejudice.

[40] In response to subsection (3)(b), the Court is of the opinion that the evidence does support the jury's finding of the statutory aggravating circumstances as enumerated in section 99-19-101 and recited in the verdict.

[41] In response to subsection (3)(c), the Court is of the opinion that the sentence of death is not excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In complying with subsection (5), we have reviewed the following capital cases in which we have rendered dispositive decisions affirming death sentences and setting dates for executions: *Culberson v. State*,

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Miss., 379 So.2d 499, No. 50,802, decided November 28, 1979, and not yet reported; *Gray v. State*, 375 So.2d 994 (Miss.1979); *Jordan v. State*, 365 So.2d 1198 (Miss.1979); *Voyles v. State*, 362 So.2d 1236 (Miss.1978); *Irving v. State*, 361 So.2d 1360 (Miss.1978); *Washington v. State*, 361 So.2d 63 (Miss. 1978); and *Bell v. State*, 360 So.2d 1206 (Miss.1978).

SYNOPSES OF THE ABOVE CASES

Bell was an armed robbery case where the robbery had been successfully completed and the killing afterward was wanton, useless and utterly unnecessary. Although at trial Bell denied having actually fired the fatal shot, there was competent evidence that showed he was armed and present when the execution-style killing occurred. The jury found as an aggravating circumstance that Bell had committed the murder and the murder had occurred during the commission of armed robbery and kidnapping.

The following circumstances in mitigation were before the jury:

(1) On the night of the murder Bell had been taking marijuana and other drugs;

(2) Bell was either seventeen or eighteen years of age;

(3) According to Bell's testimony, he was an accomplice only and had asked another not to kill the victim at one time.

In *Voyles*, a thirty-year-old defendant killed his girl friend because she refused to put title to her car in his name. He beat her into unconsciousness, ran over her with a car, and threw her body into a creek. Relying essentially on the testimony of defendant's nephew, an eyewitness who claimed innocence, the jury found him guilty of capital murder and imposed a death sentence. Aggravating circumstances included the cruelty and atrocity of the killing, that the offense was committed for pecuniary gain, and that it was committed during the course of an attempt to commit robbery. There were no mitigating circumstances submitted to the jury.

In *Culberson*, the same three aggravating circumstances were present as are present in this case. A mitigating circumstance was that the death sentence rested solely on the testimony of the admitted accomplice, who had plea-bargained for a lesser sentence. In affirming the sentence of death, we implicitly held that the testimony of an admitted accomplice in a capital murder case sufficient to sustain a conviction in the guilt phase of the trial, is sufficient to sustain the death penalty in the sentencing phase.

The proof in this case sufficiently demonstrates that the defendant was an active and willing participant in a robbery in furtherance of which a death resulted. Although there was no direct testimony that Jones struck the fatal blow, the blood on his boots, coupled with the testimony of several witnesses who placed Jones near the scene of the crime, is strong evidence that he was at least present when the fatal beating took place. The doubt concerning Jones' precise role in the homicide does not upset the jury's sentence of death under these circumstances.

Compared to the other capital cases in which we have affirmed the death sentence, this killing was equally as wanton, cruel and senseless as the others. The defendant was actively engaged in a robbery during the course of which the victim, a merchant over seventy years of age, was brutally murdered by blows to the head which crushed his skull.

The present case was heard by the full Court, sitting en banc, and carefully reviewed in the manner set forth in *Bell, supra*, and that prescribed by Mississippi Code Annotated section 99-19-105(3) (Supp. 1978).

We find that: the sentence of death was not imposed in this case under the influence of passion, prejudice or any other arbitrary factor; that the evidence supports the jury's finding of statutory aggravating circumstances; and, having considered both the crime and the defendant, we find that the sentence of death in this case is not

excessive or disproportionate to similar cases in which such sentence has been imposed. The decision in the present case is consistent with conclusions reached in other cases before this Court in which the death penalty has been imposed.

Jones' conviction of capital murder and the sentence of death imposed upon him will be affirmed.

AFFIRMED AND WEDNESDAY, MARCH 12, 1980 IS SET AS THE DATE OF EXECUTION OF THE DEATH SENTENCE.

All Justices concur in the Guilt-Determining Phase.

ROBERTSON, P. J., and WALKER, SUGG, LEE and BOWLING, JJ., concur in the Sentence-Determining Phase.

PATTERSON, C. J., SMITH, P. J., and BROOM and COFER, JJ., dissent.

APPENDIX "A"

LARRY JONES' *PRO SE* ARGUMENT TO JURY DURING SENTENCING PHASE OF THE BIFURCATED TRIAL

* * * * * *

THE JURY WAS THEREUPON RETURNED TO THE COURTROOM AND THE COURT HAVING FIRST INSTRUCTED THE JURY, MR. THOMAS PRESENTED OPENING ARGUMENT TO THE JURY ON BEHALF OF THE STATE OF MISSISSIPPI, AT THE CONCLUSION OF WHICH, THE DEFENDANT PROCEEDED WITH FINAL ARGUMENT TO THE JURY, DURING THE COURSE OF WHICH THE FOLLOWING OBJECTION WAS MADE:

THE DEFENDANT: Ladies and gentlemen, my name is Larry Jones and since I see that y'all is confused about what happened and you know, none of y'all know the real facts, which I don't either, and there was more than three peoples involved—there was four involved in the—

BY MR. NECAISE: —if the Court please, now, we object to that.

BY THE COURT: On what grounds, counsel?

BY MR. NECAISE: On the grounds that he is testifying, if the Court please, and there's no way we can cross examine him on that. He's saying there were four people involved. There's no testimony to that, Judge, and no way we can cross examine him on that. Now, he can make a plea to the jury but not something that is not in the record.

BY THE COURT: Well, as to that limited statement, I am going to overrule the objection.

* * * * * *

THE DEFENDANT CONTINUED WITH FINAL ARGUMENT TO THE JURY WHEN ANOTHER OBJECTION WAS MADE BY MR. NECAISE:

THE DEFENDANT: We got uptown. He knowed about it. I'm the only one didn't have no idea of what was happening because they had planned way before I ever thought—you know, they planned it when they got short of money—

BY MR. NECAISE: —if the Court please, we are going to object to this.

BY THE COURT: On what grounds?

BY MR. NECAISE: On the same grounds—this is not testimony—this is not in the record.

BY THE COURT: Well, that's what he's arguing, counsel. He's entitled to make argument and draw inferences from the testimony in the record and I—

BY MR. NECAISE: —Judge, it's not in the record.

BY THE COURT: —don't know that he's exceeded that yet.

* * * * * *

THE DEFENDANT PROCEEDED WITH FINAL ARGUMENT TO THE JURY AND ANOTHER OBJECTION WAS MADE BY MR. NECAISE:

THE DEFENDANT: Just as I was coming back, I seen Roy coming out with this suitcase and Willie running the opposite way—I

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APPENDIX "A"—Continued

don't know which way it was—I think it was back this way, which is—

BY MR. NECAISE: —if the Court please, now, that is testifying as to what he saw coming out. That's not drawing any inference. That's testifying and there's no way to contradict that and it's not fair, Judge, if he doesn't take the stand and let the State cross examine him on this but to stand up here and to be able to do something that the State does not have a right to cross examine him on is not proper and that is certainly outside of the record, Judge. There's nothing in the record that Roy was the one that came outside and that Roy was the one that had on the boots. There's no testimony to that. It's uncontradicted until he got up here to make what he's calling a final argument and what he's doing is testifying. The State didn't have a right to call him, Judge. We couldn't put him on the stand.

BY THE COURT: The same rule applies, counsel, to the Defendant at this time as far as the statement he makes here is not testimony and is not evidence. It's merely argument and the jury should consider only the evidence in the course of their deliberation.

BY MR. THOMAS: Judge, we are restricted to arguing based upon the evidence. He's putting testimony or trying to put it in a backdoor approach before a jury.

BY MR. MORRIS: Your Honor, I am going to take issue to that statement and ask that the jury disregard that remark.

BY THE COURT: Sustained, at least to the last remark about a backdoor approach.

* * * * * *

THE DEFENDANT CONTINUED WITH FINAL ARGUMENT TO THE JURY WHEN ANOTHER OBJECTION WAS MADE:

THE DEFENDANT: During that time, when all this was happening, I was around eighteen and I didn't know where or what they—

BY MR. NECAISE: —if the Court please, now, there is no testimony to that. Now, this is—now, Judge, there is no testimony to that.

BY MR. MORRIS: There is testimony to his age, Your Honor.

BY MR. NECAISE: Judge, there is no—

BY MR. MORRIS: —from J. D. Reddix. I challenge the record on that.

BY THE COURT: What did Reddix testify?

BY MR. MORRIS: J. D. Reddix testified that he was twenty at the time of the crime and he is now twenty-three and that the Catfish—his words exactly: Catfish was eighteen years old.

BY THE COURT: Objection overruled.

* * * * * *

FINAL ARGUMENT WAS CONCLUDED BY THE DEFENDANT IN HIS OWN BEHALF AND MR. MORRIS PROCEEDED WITH FINAL ARGUMENT TO THE JURY ON BEHALF OF THE DEFENDANT.

PATTERSON, Chief Justice, dissenting:

I concur with the majority in the procedure established for pro se arguments on the sentencing phase of a capital case, but would apply it prospectively as was done in *Jackson v. State*, 337 So.2d 1242 (Miss. 1976).[1]

I dissent from the imposition of the death sentence, because the appellant was only seventeen years of age at the time of the homicide and appears to have a borderline mental capacity. While it is true that neither his age or mental capacity was formally introduced into evidence on the sentencing phase, I nevertheless think we are compelled to consider these items on review because such were included with the report prepared by the trial judge as commanded by Mississippi Code Annotated section 99-19-105 (Supp.1979), and both age and men-

1. We have discussed the practicality of remanding this case to the trial court for the purpose of determining sentence only, but we are of the opinion that justice demands that the persons convicted and sentenced to death prior to our holding today should have the benefit of all the guidelines outlined herein. (337 So.2d at 1257)

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tal capacity are specified in section 99-19-101(6) concerning mitigating circumstances.

I have no desire to quibble regarding the precise reaction of the jury to the prosecutor's statement, "To come up behind an old man in the twilight years of life and hit him four times, as he told you, with a wrench. We finally found out what it was—with a wrench. That's what he told you when he got up here." I think it had the likelihood of leading the jury into the belief that the appellant struck the blows when there is no evidence in this record establishing that fact. Section 99-19-105(2)(a) mandates our consideration of punishment. Subsection (3) directs our attention to determining "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." I cannot state categorically whether the quoted words did or did not prejudice the jury, but I do think they had that propensity.

I would remand for another jury to determine the punishment, giving consideration to the defendant's age and mental capacity. This would also afford the opportunity for both the appellant and the state to give application to the new rules concerning pro se argument if this prerogative is again indulged by the appellant.

SMITH, P. J., and BROOM and COFER, JJ., join in this dissent.

Willie N. REDDIX

v.

STATE of Mississippi.

No. 50939.

Supreme Court of Mississippi.

Feb. 13, 1980.

Defendant was convicted before the Circuit Court, Harrison County, Jack B. Weldy, J., of capital murder and was sentenced to death, and he appealed. The Supreme Court, Cofer, J., held that: (1) even if certain court decisions and statutes had resulted in vagueness and lack of clarity in regard to rights of defendants to prove mitigating circumstances, defendant could not complain in light of trial court's sentencing instruction permitting consideration of certain factors as mitigating circumstances; (2) evidence supported finding that defendant's confession was voluntary; (3) defendant could not assert that admission of testimony in regard to wrench used in the murder was error where evidence in regard to wrench was first interjected into the record by defendant; (4) admission of evidence of defendant's convictions occurring subsequent to murder offense as evidence of aggravating circumstances was not error; (5) trial court did not err in giving certain instructions on mitigating circumstances; (6) death penalty was not shown to have been imposed under influence of passion, prejudice or other arbitrary factors; and (7) the death sentence was not disproportionate to penalty imposed in similar cases.

Affirmed.

1. Homicide ⇐354

Even if certain court decisions and statutes had resulted in vagueness and lack of clarity in regard to rights of defendants to prove mitigating circumstances during sentencing phase of capital cases, a defendant, who was convicted of capital murder and was sentenced to death could not complain in regard to such vagueness and lack of clarity, in light of fact that sentencing instruction permitted consideration of age of defendant at time of crime, any mitigating circumstances or combination of mitigating circumstances surrounding his life and character and any mitigating circumstances or combinations of mitigating circumstances surrounding commission of the offense. Code 1972, §§ 97-3-19(2)(e), 99-19-101, 99-19-103.

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one Arthur Weinberger, a human [illegible],

the crime of armed robbery upon him, in violation of Section 97-3-19, Sub-Section (2)(e), of the Mississippi Code of 1972, as amended, and

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS NO. 968

[illegible] JONES

ORDER

This cause came on to be heard on the Motion of the State of Mississippi to amend the indictment in the above styled and numbered cause to delete the word "armed" before the word robbery in said indictment and the Court, after considering said Motion and hearing argument on the same is of the opinion that said motion is well taken and should be sustained for the reason that the inclusion of the word "armed" before robbery in the indictment is surplage and that the said amendment does not change the substance of the charge in the above styled and numbered cause. It is, therefore,

ORDERED AND ADJUDGED that the indictment in the above styled and numbered cause be and the same is hereby amended to delete the word "armed" before the word robbery in the indictment, and that the original of this Motion to Amend and this Order amending the indictment shall be attached to and made a part of the indictment in this cause.

ORDERED AND ADJUDGED on this the 14th day of December, 1977.

Floyd J. Logan

FLOYD J. LOGAN
CIRCUIT COURT JUDGE

FILED

DEC 14 1977

W. L. LEE
CIRCUIT CLERK
HARRISON COUNTY
BY [illegible] D.C.

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful citizens of Harrison County, Second Judicial District thereof, duly elected, empaneled, sworn and charged to inquire in and for said County, Judicial District and State aforesaid, at the Term aforesaid of the Court aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That

WILLIE N. REDDIX; LARRY JONES; and JOHN DURENGO REDDIX

late of the County and Judicial District aforesaid, on or about the 2nd day of December in the year of our Lord, 19 74, in the County, Judicial District and State aforesaid, and within the jurisdiction of this Court, did unlawfully, wilfully & feloniously, with malice aforethought, kill and murder one Arthur Weinberger, a human being, while engaged in the commission of the crime of armed robbery upon him, in violation of Section 97-3-19, Sub-Section (2)(e), of the Mississippi Code of 1972, as amended, and

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS NO. 968

[illegible] JONES

ORDER

This cause came on to be heard on the Motion of the State of Mississippi to amend the indictment in the above styled and numbered cause to delete the word "armed" before the word robbery in said indictment and the Court, after considering said Motion and hearing argument on the same is of the opinion that said motion is well taken and should be sustained for the reason that the inclusion of the word "armed" before robbery in the indictment is surplage and that the said amendment does not change the substance of the charge in the above styled and numbered cause. It is, therefore,

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ORDERED AND ADJUDGED on this the 14th day of December, 1977.

58 Miss. 778.

SAMUEL HAWTHORNE v. THE STATE.

(April Term, 1881.)

1. *Murder. Under sect. 2028, Code of 1871. At common law.*

The first clause of sect. 2028 of the Code of 1871, which provides that "the killing of a human being without the authority of law shall be murder, when with a deliberate design to effect the death of the person killed, or of any human being," does not alter the common law so as to limit murder to killing with "express malice," but murder is still, under that clause, the unlawful killing of a human being with malice, express or implied: and malice is implied from any intentional killing which the law does not make justifiable or excusable.

2. *Same. "Malice aforethought." "Deliberate design." Meanings thereof.*

The words "malice aforethought," as used at common law, mean the same as the words "premeditated design," used in defining murder in the act of February 15, 1839 (Hutch. Code, 954), and as the words "deliberate design," employed in the Codes of 1857 and 1871 in defining murder. The act of 1839 defining murder having been three times re-enacted since it was interpreted in McDaniel v. The State, 8 Smed. & M. 401 [47 Am. Dec. 93], that interpretation must be held to have been approved and adopted with the act.

3. *Same. "Deliberate design." How formed. When presumed.*

A "deliberate design" to effect death, as meant in our statute defining murder, may be formed suddenly; and the use of a deadly weapon to kill is presumptive evidence of such design.

4. *Same. Presumptions. Innocence. Use of deadly weapon. Evidence. Effect.*

Where one is accused of murder, the law presumes him to be innocent until the contrary is made to appear; but if it be shown that he killed the deceased with a deadly weapon, the general presumption of innocence yields to the specific proof, and the law infers that the killing, if unexplained, was malicious, and therefore murder; but if the attendant circumstances be shown in evidence, by the State or the accused, the character of the killing is to be determined by considering them; and if, upon a consideration of all of the evidence, the jury trying the case are not satisfied, to the exclusion of every reasonable doubt, they should not convict. McDaniel v. The State, 8 Smed.

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*& M. 401 [47 Am. Dec. 93], approved; Head v. The State, and Evans v. The State, 44 Miss. 731, 762, partially overruled.

[Cited in Lamar v. State, 63 Miss. 273; Burt v. State, 72 Miss. 412, 16 South. 512, 48 Am. St. Rep. 563; Godwin v. State, 73 Miss. 882, 19 South. 712; King v. State, 74 Miss. 582, 21 South. 235; McDonald v. State, 78 Miss. 375, 29 South. 171; Gee v. State, 80 Miss. 288, 31 South. 702; Caffey v. State, 24 South. 315.]

[See 26 Cent. Dig. Homicide, § 269.]

5. *Same. Error in instruction. When ground of reversal.*

Where, in the trial of a criminal case, the court, in instructions given for the State, commits an error prejudicial to the accused, and he is convicted, the judgment must be reversed, on appeal, unless it clearly appears that such error was corrected and cured by instruction for the accused.

[Cited in Smith v. State, 58 Miss. 874; Guice v. State, 60 Miss. 726; Ingram v. State, 62 Miss. 144; Dawson v. State, Id. 244; Bishop v. State, Id. 296; Lamar v. State, 63 Miss. 274; Harper v. State, 83 Miss. 419, 35 South. 572.]

[See 15 Cent. Dig. Criminal Law, § 3096.]

6. *Same. Presumption. Evidence. Instruction.*

An instruction, in a trial for murder, which states, in effect, that if the proof shows the killing in certain named circumstances, the law presumes it to have been murder, and that it devolves upon the accused to show the circumstances which will excuse his act, is erroneous, when not coupled with the charge that such circumstances may be made to appear as well by the evidence for the State as by that of the accused.

[See 26 Cent. Dig. Homicide, § 276.]

7. *Same. Presumption of malice. Evidence to rebut. Instruction.*

An instruction, in the trial of one indicted for murder, which suggests or requires, that after proof of the killing with a deadly weapon, the accused, in order to rebut the presumption arising therefrom, must show to the satisfaction of the jury that the killing was not malicious, is erroneous.

[See 26 Cent. Dig. Homicide, § 479.]

Error to the Circuit Court of Warren County.

Hon. U. M. Young, Judge.

Samuel Hawthorne, having been convicted of murder, brought his case to this court by writ of error, and assigned for error the action of the court below in giving the following instructions, amongst others, for the State:—

"2. Murder is the killing of a human being with malice aforethought; and if the jury believe from the evidence, beyond every reasonable doubt arising therefrom, that the defendant (Samuel Hawthorne) shot and killed the deceased, Lemuel McGee, and that the killing was done with malice aforethought, then he is guilty of murder, and the jury should so find.

"3. Although the malice in murder is what is called 'malice aforethought,' yet there is no particular period of time during which it is necessary that it should have existed, or during which the prisoner should have contemplated the homicide. If the intent to kill, or do other great bodily harm, is executed the instant it springs into the mind, the offence is as truly murder as if it had dwelt

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there for a longer time; unless the jury believe from all the evidence in the case that the killing was manslaughter, or was done in necessary self-defence.

"4. Every homicide is presumed in law to be malicious, and therefore murder; and when the killing has been proven beyond a reasonable doubt, the law will presume the malice requisite to murder, and the burden of proof is then shifted to the defendant to show some circumstance of alleviation, justification, or excuse, unless these arise out of the evidence which has been adduced against him on the part of the State.

"5. Malice may also be implied from the deliberate use of a deadly weapon; and if the jury believe from the evidence, beyond every reasonable doubt arising therefrom, that the defendant shot and killed the deceased with a deadly weapon, and that such killing was done deliberately, then the law will imply the malice requisite to murder, and the burden of showing that the killing was not malicious will be upon the defendant; and unless he does this to the satisfaction of the jury, they will find him guilty of murder.

"6. Malice may also be inferred from any circumstances of barbarity and cruelty attending the killing; and if the jury believe from the evidence, beyond every reasonable doubt arising therefrom, that defendant killed deceased, and that he did it in a cruel and barbarous manner, then the law will declare the killing to be malicious, and therefore murder, and it will then devolve upon the prisoner to show that it was done either in the heat of passion (in which case it would be manslaughter), or that it was done in the necessary defence of himself."

[For subsequent opinion, see, 61 Miss. 749.]

H. F. Simrall, for the plaintiff in error.

1. The crime of murder, in this State, is purely statutory, the common law only being of value in interpreting the statute. Whether a homicide is murder, under the first clause of sect. 2628 of the Code of 1871, is dependent upon whether it resulted from a "deliberate design." There can be no murder, under this clause, unless the slayer was moved by "ex-

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*press malice," "a sedate, deliberate intention." Implied malice, which is the offspring of sudden impulse, is not embraced within the meaning of the words "deliberate design." These words, as used in the statute, are the equivalent of "express malice" at common law, but exclude "implied malice." The words "malice aforethought" embrace both express and implied malice, and therefore the second instruction for the State was erroneous. 2 Whart. Cr. Law, sect. 1079, and cases; 1 Russ. on Cr. 387, 422, and note; Anthony's Case, 13 Smed. & M. 261; 4 Bla. Comm. 199; 7 Bac. Abr. 199; Hale's P. C. 451; Riggs' Case, 24 Miss. 526; 26 Miss. 51; 28 Miss. 100; 31 Miss. 473; 42 Miss. 328; 1 Chitty's Cr. Law, 228; Hunt's Case, 8 Ohio St. 112; 11 Ohio St. 284; 27 Iowa, 101; 5 Mo. 361; 20 Mo. 58; 25 Mo 325; 1 Whart. Cr. Law, sect. 1081; 2 Bishop's Cr. Proc. 562-579; 53 N. Y. 161; 7 N. Y. 226; 37 N. Y. 418; 24 Wend. 520, 580; 24 Pa. St. 386.

2. It is error for the court to instruct the jury that the mere proof of killing raises the presumption of a "deliberate design." McCormack's Case, 27 Iowa 413; Hill's Case, 2 Gratt. 594; White's Case, 24 Wend. 580; Johnson's Case, 24 Pa. St. 386; Turner's Case, Wright, 20. Therefore, the fourth instruction for the State was wrong.

3. Where the fact of the killing and its circumstances are in evidence, it is error for the court to charge the jury that malice may be implied from the deliberate use of a deadly weapon. 1 Greenl. on Ev. 14. Such error was committed in the fifth instruction for the State.

4. The fifth instruction for the State was also erroneous in putting the burden of proof on the defendant "to show that the killing was not malicious." Long's Case, 32 Miss. 32; Fortenberry's Case, 55 Miss. 409; Pollard's Case, 53 Miss. 410; Cunningham's Case, 56 Miss. 270.

5. The third instruction for the defendant is inconsistent with the third, fourth, fifth, and sixth for the State. Such inconsistency is error. The instructions for the defendant did not cure the error in those for the State.

H. F. Simrall also made an oral argument.

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*R. V. Booth, on the same side.

1. The fourth, fifth, and sixth instructions for the State are erroneous. York's Case, 9 Mete. 125; 1 Bishop's Cr. Proc. 493, 503; 28 Ala. 693; 1 Whart. Cr. Law, 707; 1 Gray, 61; 14 Texas, 503; 5 Cush. 320; 9 Gray, 136; 38 Me. 261; 28 Ala. 65; 3 Gray, 463; Whart. on Hom., sects. 30, 620, 671; 31 Miss. 504; 44 Miss. 731; 8 Smed. & M. 401; 18 Wall. 516; 53 N. Y. 164; 53 Miss. 410; 56 Miss. 279; 10 Mich. 212; 34 Iowa, 131; 5 Iowa, 433.

2. The court erred in granting conflicting instructions. Cunningham v. The State, 56 Miss. 277.

R. V. Booth also argued the case orally.

M. Marshall, on the same side, cited the following authorities upon the rule of appellate practice, where error has been committed against the defendant in instruction for the State: Mask's Case, 36 Miss. 91; Catton's Case, 31 Miss. 510; 37 Miss. 320, 378; 39 Miss. 647; 44 Miss. 732, 797; 28 Miss. 698; 44 Miss. 775; 53 Miss. 407; 55 Miss. 478; 50 Miss. 81; 52 Miss. 89; 56 Miss. 269.

M. Marshall made an oral argument also.

L. W. Magruder, on the same side, cited the following authorities:—

1. Upon the construction of the statute defining murder: 53 N. Y. 164; Whart. on Hom., sects. 30, 173, 658, 664, 671; 32 N. Am. Rev. 178; 9 Mete. 130; Cooley's Const. Lim. 325; 1 Hale's P. C. 425; 4 Black. 198; 3 Co. Inst. 47; 3 Post. 256; Bac. Abr., tit. "Malice;" 5 Yerg. 340; Add. 282; 1 Russ. on Cr. 482; 1 Ashm. 181; 2 Ashm. 227; 4 Dall. 14; 2 Gratt. 594; 3 Humph. 439; 36 Texas, 523; 3 Sehl. 385; 1 Park. Cr. 347.

2. Upon the burden of proof: 1 Whart. Cr. Law, sect. 707; Whart. on Hom., sect. 647; 53 Miss. 410; 56 Miss. 289; 53 N. Y 164; 24 Iowa, 570; 5 Nev. 166.

L. W. Magruder also argued the case orally.

T. C. Catchings, Attorney-General, for the State.

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1. The instructions for the State, to the
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effect that when a *prima facie case has been made out by the State the burden of proof is shifted to the defendant to show circumstances of extenuation or justification, convey to the jury the true idea of the law. The Commonwealth v. York, 9 Mete. 122; The Commonwealth v. Knapp, 10 Pick. 484.

2. The charge in the fifth and sixth instructions for the State, that the use of a deadly weapon in killing raises the presumption of malice, is correct. 8 Smed. & M. 417; 28 Miss. 608; 36 Miss. 90; 39 Miss. 600; 44 Miss. 753.

3. The defect of the fifth and sixth instructions in not containing the qualifying words, "unless the circumstances of alleviation arise out of the evidence of the State," was cured by the first, third, and fourth instructions.

4. The use of the word "satisfaction," in the fifth and sixth instructions for the State, though not proper, was warranted by the case of Harris v. The State, 47 Miss. 318.

5. I insist that murder is still, as at common law, the killing of a human being with malice aforethought, and that the laws of evidence by which the offence is to be established remain unchanged by statute. The law of express and implied malice is unchanged. Every murder, whether with express or implied malice, must have been committed with "a deliberate design," which may have been long formed or instantaneous. 4 Bla. Comm. 484; 2 Whart. Cr. Law, sects. 941, 945; 28 Pa. St. 14; 31 Pa. St. 200; 2 Gratt. 598; 6 Coldw. 8; 7 Iowa, 311.

T. C. Catchings, Attorney-General, also argued the case orally.

CAMPBELL, J., delivered the opinion of the court.

It is too late, by many years, to dispute here the propositions, that the law implies malice from the unlawful use of a deadly weapon, and that every homicide by the use of such weapon is presumed to be murder, and that "malice aforethought" is the same as "deliberate design" or "premeditated design."

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*There is no difference, in the definition of murder, between the act of February 15, 1839 (Hutch. Code, 954), and art. 165 of the Code of 1857 (p. 920), and sect. 2928 of the Code of 1871. There is a slight verbal difference between the first act mentioned and the others, but that makes no change in the law as to murder. The act of February 15, 1839, has the phrase "premeditated design," which in the Codes is changed into "deliberate design," and these phrases are equivalent, and are used convertibly in defining murder.

Prior to 1839 there was no statute in this State defining murder.

In the first case found in our reports involving an interpretation of the act of 1839 with respect to murder (McDaniel v. The State, 8 Smed. & M. 401 [47 Am. Dec. 93]), it was held that every homicide is presumed to be committed with malice aforethought, and that the words "premeditated design" are the same in legal effect as the words "malice aforethought," and that the law presumes malice from the use of a deadly weapon; and that these presumptions, if unopposed, may amount to full proof, and that they stand until a contrary and stronger presumption is raised by the evidence.

In Boles v. The State, 9 Smed. & M. 284, counsel for the prisoner pressed the point that the statute cited above altered the common law, in this: "that a killing on sudden passion is clearly not with premeditated design," and, therefore, is not murder; but the court found no fault with an instruction that "it is not necessary for the jury to believe that the defendant previously harbored the design to kill the deceased, if he killed him, even upon a sudden passion, without provocation such as the law recognizes as sufficient," etc. In Green v. The State, 28 Miss. 687, an instruction that "every killing is presumed to be malicious, and amounting to murder, until the contrary appears," etc., was approved, with the emphatic declaration, "if anything is to be considered as settled by sound judicial reasoning and authority, this doctrine must be so regarded."

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*To the same effect are Riggs v. The State, 30 Miss. 635; Hague v. The State, 34 Miss. 616; Mask v. The State, 36 Miss. 77; Jeff v. The State, 39 Miss. 593; Head v. The State, 44 Miss. 731; Evans v. The State, 44 Miss. 762.

In Mask v. The State, an instruction that "murder is the unlawful killing * * * with malice aforethought, or premeditated design, which is the same thing. Malice is express or implied," etc., was approved by the court. In Head v. The State, the true rule is declared to be: "If there be no excuse or justification for the homicide by the accused shown in the evidence adduced by the State, then the accused is guilty of murder, unless he has by his evidence proved excuse or justification;" and the court in express terms repudiated the idea that "malice cannot be inferred simply from the fact of the use of such weapon" as the accused may have had on his person, which he usually carried.

In Evans v. The State, an instruction that "every killing with a deadly weapon is presumed to be malicious, and amounts to murder, until the contrary appears," etc., was expressly said to announce the true rule; and an instruction given as a substitute for several asked by the prisoner, and in these words: "If the jury are satisfied from the whole evidence that the accused deliberately shot and killed the deceased, at a time when the accused was in no actual danger of great

bodily harm, or of his life, then the accused is guilty of murder. But * * * it devolves upon the accused, however, to show to the jury, by clear and satisfactory proof, that there was an actual necessity for killing the deceased before he entered his house," was said to give the accused the benefit "of a broader exposition of self-defence * * * than is warranted by the law."

The case of Anthony v. The State, 13 Smed. & M. 263, is claimed by counsel for the appellant to be decisive of the correctness of the contention that the words "malice aforethought" are not equivalent to "deliberate design." Because an indictment char-

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ging the accused with having *committed an offence "feloniously, willfully, and of his malice aforethought," was held to be insufficient to describe the offence, which consisted in an act done with "malice aforethought, express," it is argued here that "deliberate design," as used in the statute defining murder, means more than "malice aforethought," and that only killing with malice "express" is made murder. The particular statute with reference to which Anthony v. The State was decided, in terms, made a distinction between implied and express malice, and it was rightly held that the omission from the indictment of the "most material word in the constitution of the offence"—i. e., "express," as descriptive of the malice—was fatal. But under the Code it is sufficient to charge, in an indictment for murder, "that the defendant did feloniously, willfully, and of his malice aforethought, kill and murder the deceased." Code 1871, sect. 2802. From which it appears that the legislative intent was that the charge of unlawfully killing a human being, with the deliberate design to effect death, should be made by the words "feloniously, willfully, and of his malice aforethought," which is suggestive of the legislative understanding and purpose to treat them as equivalent forms of expression.

The law-giver has interpreted the phrase "deliberate design," as employed in the statute defining murder, by designating apt words by which to make the charge of murder. Code 1871, sect. 2802.

We make no reference to the views held by certain law-writers and the courts of some of the other States, because the question of what is murder is not an open one in this State. It has been settled, beyond dispute, by forty years of administration and by repeated utterances of this court. The act of February 15, 1839, defining murder, has been three times re-enacted in this State since it was interpreted in McDaniel v. The State, and that interpretation of it must be held to have been deliberately approved and adopted with it.

We do not approve of what we have quot-

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ed from Head v. The *State, and Evans v. The State. We do not regard as correct the statement in the opinion in Head v. The State, that the true rule is: "If there be no excuse or justification for the homicide by the accused shown in the evidence adduced by the State, then the accused is guilty of murder, unless he has by his evidence proved excuse or justification." The true rule is that the accused should be convicted, if from the whole evidence there is not a reasonable doubt of his guilt.

To require him, by his evidence, to prove excuse or justification is to impose a greater burden than the law requires or permits.

We do not approve the instruction given by the court in Evans v. The State as a substitute for three asked by the accused, and dissent from the view that it was more favorable to the accused than the law warranted, as remarked in the opinion in that case. In our view, it did not devolve on the accused to show, by clear and satisfactory proof, that there was an actual necessity for killing the deceased, as that instruction announced. We understand the settled rule to be this: The law presumes the accused to be innocent of the crime charged, until the contrary is made to appear; but when it is shown that he killed the deceased with a deadly weapon, the general presumption of innocence yields to the specific proof of such homicide, and the law infers that it was malicious, and therefore murder, because as a rule, it is unlawful to kill a human being, and is murder if not something else; and as special circumstances only will vary the legal view of homicide so as to relieve it from the character of murder, it is inferred or presumed to be such from the fact of killing unexplained; but if the attendant circumstances are shown in evidence, whether on the part of the State or the accused, the character of the killing is to be determined by considering them, and it is then not a matter for presumption which operates in the absence of explanatory evidence, but for determination from the circumstances shown in evidence. This is the doctrine of the case of McDaniel v. The State, 8

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Smed. & M. 401 [47 Am. Dec. 93], and of *other cases, including Head v. The State, and we approve it.

In considering the circumstances of a homicide, as disclosed by all the evidence, the jury is to keep in view the rule that, if from a consideration of all the evidence there exists a reasonable doubt as to the character of the killing, it must be resolved in favor of the accused, who should not be convicted of any crime not made out by the evidence beyond all reasonable doubt.

We reject the suggestion that our statute alters the common law as to implied malice, and that murder is limited by the statute to killing with "express malice," and adhere to the view of our predecessors, that murder is the unlawful killing of a human being with malice, express or implied; and that malice

is implied from any intentional killing which the law does not make justifiable or excusable; and that "malice aforethought" and "premeditated design," or "deliberate design," mean the same thing; and that "deliberate design" may be formed suddenly, and that the use of a deadly weapon to kill is evidence of deliberate design to effect death. The settled rule in this court is that all of the instructions given by the court to the jury are to be construed together, and if, taken together, they correctly announce the law, a reversal of the judgment will not occur although some of the instructions, in themselves, may not be strictly correct. Mask v. The State, 36 Miss. 91; Head v. The State, 44 Miss. 731; Scarver v. The State, 53 Miss. 407. This is a necessary rule under our system, in which the judge instructs the jury only "at the request of either party." A proper qualification of the rule is, that it should very clearly appear that any error in the instructions for the State was effectually corrected and cured by instruction for the accused bearing on the point wherein there is error in the instruction given at the request of the State; otherwise, erroneous instruction for the State should cause a reversal.

The instructions for the State, except the

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fifth and sixth, *are unexceptionable. The fifth and sixth are obnoxious to the objection held good in McDaniel v. The State, 8 Smed. & M. 401 [47 Am. Dec. 93], because they announce that it devolves on the prisoner to show the circumstances which excuse his act, omitting the necessary qualification, "unless they arise out of the evidence produced against him." Besides this valid objection, the fifth instruction declares the burden of showing that the killing was not malicious to be upon the prisoner, and that unless he did this to the satisfaction of the jury he was to be found guilty. It not only imposed on the accused the duty to show that the killing was not malicious, but suggests, if it does not require, that he should furnish a preponderance of evidence in support of this negation. He was required by it to show that the killing was not malicious, to the satisfaction of the jury; and nothing less than preponderant evidence could do this. Although this instruction is fully sustained by the language of the court in Head v. The State, above quoted, it is not correct, for it is not true that the accused must produce evidence to prove that he is not guilty. The State must prove that he is guilty.

The question is, Does it clearly appear, and can we say with entire confidence that the error of this instruction was effectually cured and its vicious influence completely removed by instructions given for the defendant? The third instruction for the defendant is in these words: "The law presumes that the prisoner is innocent, and the burden of proof is on the State to show that he is guilty; and if, upon all the evidence, the jury entertains a reasonable doubt as to whether the killing proceeded from a murderous intent on the part of the prisoner, or, on the other hand, from the principle of self-defence, they must find the prisoner not guilty." It consists of three propositions: 1. The statement of the legal presumption of innocence. 2. The announcement that the burden of showing guilt is on the State. 3. That if from all the evidence the

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jury has a reasonable doubt whether the *killing was done with evil intent, or in self-defence, they must acquit.

It may be assumed that proof of the killing in this case displaced the presumption of innocence, and that the burden on the State to show guilt was held to be discharged by evidence of the killing as proved.

The duty of the jury to acquit if, from all the evidence, there existed a reasonable doubt whether the killing proceeded from a murderous intent, or from self-defence, stood opposed to the declaration in the instruction for the State that the burden of showing that the killing was not malicious was upon the defendant, and unless he did this to the satisfaction of the jury, it was to find him guilty of murder.

It is impossible for us to say that the jury was not misled by these opposite rules, to the injury of the accused.

It is at least doubtful whether the vice in the instructions for the State was effectually cured by the instructions for the accused. It is certain that error was committed against him. It is not certain that it was completely removed. There is no other instruction, except the fourth, for the accused, which has any direct bearing on the point in which the error was committed in instructing for the State.

Judgment reversed, new trial awarded, and cause remanded.

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58 Miss. 790.

H. M. SULLIVAN v. BOARD OF SUPERVISORS OF LAFAYETTE COUNTY.

(April Term, 1881.)

1. *Highway. Continuity in crossing river. Ferry.*

Where a river crosses a public road, the continuity of the highway is not broken,—it does not end on one side of the stream and begin on the other, but continues across the stream,—and the public, for the purpose of travel, have the same right to go over the highway on the ... r that they have to pass along any other portion of it; but where it is necessary that there should be some means of transportation over such stream, the law provides for a ferry, and in return for the services of a keeper thereof, permits him to charge and collect from persons transported by his ferry a reasonable toll.

[Cited in Seal v. Donnelly, 60 Miss. 923.]

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*2. *Ferry. Object thereof. Toll.*

Under the statutes of this State, the sole object of the establishment of a ferry on a

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS CAUSE NO. 968

WILLIE N. REDDIX

INSTRUCTION NO. S-1

The Court instructs the Jury that the killing of a human being without the authority of law by any means or in any manner shall be Capital Murder when done with any design to effect death by any person engaged in the commission of the crime of robbery. The Court therefore instructs the Jury that if you believe from the evidence in this case beyond a reasonable doubt, that the Defendant, Willie N. Reddix, in company with another person, in the Second Judicial District of Harrison County, Mississippi, on or about the time and date charged and testified about, went to Art's Levi's in Biloxi, Mississippi, and did then and there take the personal property of one Arthur Weinberger, to-wit: clothing and valuables from his business, and against his will by violence to his person, and did then and there rob the said Arthur Weinberger of said personal property, and while so engaged in this design, the said Willie N. Reddix, acting in concert with another, struck the said Arthur Weinberger and killed him with an instrument, to-wit: a wrench, with the formed purpose to effect his death and as a result of said blows to the head, the said Arthur Weinberger died, and said murder was without justification or in necessary self-defense, then the Jury shall find the Defendant guilty of Capital Murder.

FILED

This 8 day of Dec 1977,

at 9:50 A.M.

W. K. Lee

Circuit Clerk

By Sarah Wattsook

Deputy Clerk

GIVEN JGW

REFUSED

812 Appendix E

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IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS NO. 968

WILLIE N. REDDIX INSTRUCTION NO. S-2

The Defendant, Willie N. Reddix, has been charged by an indictment with the crime of Capital Murder for having caused the death of Arthur Weinberger, while engaged in the commission of a Robbery upon his person.

If you find from the evidence in this case beyond a reasonable doubt that the Defendant, Willie N. Reddix, was engaged in the criminal act of Robbery and that during the commission of the said Robbery the Defendant acting in concert with another did unlawfully, wilfully, feloniously and of their malice aforethought kill and murder Arthur Weinberger, a living person, and that said killing was done not in necessary self-defense or otherwise justifiable, then you should find the accused guilty of Capital Murder.

FILED

This 7th day of Dec 1977.

at 1:20 P.M.

H. E. Poe

Circuit Clerk

By Ellie Fayard

Deputy Clerk

GIVEN

JDW

REFUSED

IN THE CIRCUIT COURT OF [illegible]

SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS CAUSE NO. 968

WILLIE N. REDDIX

SENTENCING HEARING INSTRUCTION NO. S-3

The Court instructs the Jury that before you may return a verdict that the Defendant shall suffer the penalty of death, you must unanimously find in writing that after weighing the mitigating circumstances and the aggravating circumstance, if any, one against the other, that the mitigating circumstances do not outweigh the aggravating circumstances and that the Defendant should suffer the penalty of death.

If your verdict be a unanimous verdict of death, you shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which you unanimously found beyond a reasonable doubt to exist.

In this case the term "Aggravating Circumstances" is limited to the following questions:

1. Was the offense committed while the Defendant was engaged in the commission of the crime of robbery, or in an attempt to commit robbery? Robbery is defined as the felonious taking of the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person. If a person shall design and endeavor to commit an offense, and shall do any overt act toward the commission thereof, but shall fail therein, or shall be prevented from committing the same, then he would be guilty of an attempt to commit the offense.

2. Was the offense especially heinous, atrocious, or cruel?

3. Was the Defendant convicted of a felony involving the use of threat of violence to the person?

In this case the term "Mitigating Circumstances" may be the following:

1. The age of the Defendant at the time of the crime.

2. Any mitigating circumstances or combination of mitigating

ircumstances surrounding his life and character.

3. Any mitigating circumstances or combination of mitigating ircumstances surrounding the commission of the offense with which e is charged.

If you find from the evidence, beyond a reasonable doubt, that he capital offense was committed while the Defendant was engaged, or as an accomplice, in an attempt to commit the crime of robbery; that the ffense was especially heinous, atrocious and cruel; that the Defendant as previously convicted of a felony involving the use or threat of iolence to the person; and that the death penalty should be imposed, our verdict shall be written on a separtate piece of paper, shall be igned by your foreman and may be in the following form:

"We, the jury, unanimously find from the evidence and beyond a reasonable doubt that the capital murder in this case was committed while the Defendant was engaged in the commission of the crime of [redacted] robbery; that the capital offense was especially heinous, atrocious and cruel; and that the Defendant has been previously convicted of a felony involving the use or threat of violence to the person.

We further find unanimously from the evidence and beyond a reasonable doubt that after weighing mitigating circumstances and the aggravating circumstances, one against the other, that the mitigating circumstances do not outweigh the aggravating circumstances, and that the Defendant should suffer the penalty of death."

_____
Foreman of the Jury

On the other hand, if you find the Defendant should be sentenced to imprisonment for life in the State Penitentiary, your verdict may be in the following form:

"We, the jury, find in this case that the Defendant should be sentenced to imprisonment for life in the State Penitentiary."

If the jury cannot, within a reasonable time, agree as to the punishment, the Judge will impose a sentence of imprisonment for life. In such case, you should certify your disagreement in the following form:

"We, the Jury , after due consideration, have been unable to agree upon the punishment and hereby request the Judge to dismiss the jury from further deliberation."

FILED

This 1 day of Dec 1977.

at 1:05 p.M.

W. L. Lee

Circuit Clerk

By Sarah Washrock

Deputy Clerk

GIVEN REFUSED